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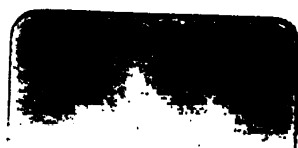
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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

W. W. COPE,
REPORTER.

VOLUME 67.
WITH
NOTES ON CAL. REPORTS

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

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ORGANIZATION OF SUPREME COURT.

[Constitution, article 6, section 2.]

§ 2. The Supreme Court shall consist of a chief justice and six associate justices. The court may sit in departments and in Bank, and shall always be open for the transaction of business. There shall be two departments, denominated, respectively, Department One and Department Two. The chief justice shall assign three of the associate justices to each department, and such assignment may be changed by him from time to time. The associate justices shall be competent to sit in either department, and may interchange with each other by agreement among themselves, or as ordered by the chief justice. Each of the departments shall have the power to hear and determine causes and all questions arising therein, subject to the provisions hereinafter contained in relation to the court in Bank. The presence of three justices shall be necessary to transact any business in either of the departments, except such as may be done at chambers, and the concurrence of three justices shall be necessary to pronounce a judgment. The chief justice shall apportion the business to the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in Bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have

the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in Bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice, in writing, with the concurrence of two associate justices. The chief justice may convene the court in Bank at any time, and shall be the presiding justice of the court when so convened. The concurrence of four justices present at the argument shall be necessary to pronounce a judgment in Bank; but if four justices, so present, do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument; but to render a judgment, a concurrence of four judges shall be necessary. In the determination of causes, all decisions of the court in Bank or in departments shall be given in writing, and the grounds of the decision shall be stated. The chief justice may sit in either department, and shall preside when so sitting, but the justices assigned to each department shall select one of their number as presiding justice. In case of the absence of the chief justice from the place at which the court is held, or his inability to act, the associate justices shall select one of their own number to perform the duties and exercise the powers of the chief justice during such absence or inability to act.

SUPREME COURT COMMISSIONERS.

[Statutes, 1885, page 101.]

§ 1. The Supreme Court of the State of California, immediately upon the taking effect of this act, shall appoint three persons of legal learning and personal worth, as commissioners of said court. It shall be the duty of said commissioners, under such rules and regulations as said court may adopt, to aid and assist the court in the performance of its duties, and in the disposition of the numerous causes now pending in said court undetermined. The said commissioners shall hold office for the term of four years from and after their appointment, during which time they shall not engage in the practice of the law. They shall each receive a salary equal to the salary of a judge of said court, payable at the same time and in the same manner. Before entering upon the discharge of their duties, they shall each take an oath to support the Constitution of the United States and the Constitution of the State of California, and to faithfully discharge the duties of the office of commissioner of the Supreme Court to the best of their ability. The said court shall have power to remove any and all members of said commission at any time, by an order entered on the minutes of said court, and all vacancies in said commission shall be filled in like manner.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[No. 8968. Department Two.—May 4, 1885.]

MICHAEL TYRRELL, APPELLANT, v. A. W. BALDWIN
ET AL., RESPONDENTS.

PRACTICE—VOLUNTARY APPEARANCE OF DEFENDANT—SUMMONS.—The voluntary appearance of defendant in an action is equivalent to personal service of the summons and a copy of the complaint upon him.

ID.—JUDGMENT AGAINST DEFENDANT VOLUNTARILY APPEARING.—A judgment in an action of ejectment rendered against a person who voluntarily appeared therein as a defendant, is not void so as to be collaterally assailable, although his name was not inserted in the complaint either originally or by amendment, and no order of the court granting him leave to appear in or defend the action, or to file an answer, is contained in the record.

JUDGMENT—DEATH OF DEFENDANT—PURCHASER PENDENTE LITE—EJECTMENT.—The death of a defendant in an action of ejectment after his answer was filed and before the trial does not render a judgment against him void as to those who purchased *pendente lite* his interest in the demanded premises.

ID.—CONCLUSIVENESS OF JUDGMENTS.—Where several judgments have been rendered in actions between the same parties in respect to the same subject-matter, the judgment last in point of time is conclusive.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

Action to quiet title to a lot in the city and county of San Francisco, situated within the limits defined in the Van Ness

LXVII. CAL.—1

Ordinance. On January 1, 1855, one J. T. Baxter was in the actual possession and occupancy of the land, claiming to own the same, and remained in possession thereof until September 16, 1862, when he sold and delivered the possession to Sarah McDonald, wife of Charles McDonald. The McDonalds entered and remained in possession until August 13, 1867, when they sold the lot and delivered the possession to the plaintiff, who entered and remained in possession until April 6, 1877, when he was dispossessed under a writ of possession issued in the action of *McLeran v. McNamara*. On the trial, after the defendants had put in evidence the judgment roll in *McLeran v. McNamara*, and a deed from McLeran to one George K. Porter, under whom they claimed to have derived title by mesne conveyances, the plaintiff offered in evidence the judgment roll in an action of ejectment brought February 18, 1873, by Porter against the plaintiff and others, in which it was adjudged that neither Porter nor any of his predecessors ever had or were entitled to the possession of the premises in controversy. The court excluded the evidence, to which ruling the plaintiff excepted. The further facts are stated in the opinion of the court.

E. W. McGraw, and Wm. Royal, for Appellant.

The judgment roll in *McLeran v. McNamara* was improperly admitted in evidence, the judgment being void as against the plaintiff for the reason that the McDonalds from whom the plaintiffs purchased were not made parties to the action, either by the original complaint or by amendment. (*McKinley v. Tuttle*, 42 Cal. 570; *Farris v. Merritt*, 63 Cal. 118.) The judgment roll in the case of *Porter v. Woodward* was admissible in evidence without having been pleaded. (*Clink v. Thurston*, 47 Cal. 21; *Flandreau v. Downey*, 23 Cal. 354; *Jackson v. Lodge*, 36 Cal. 28; *Curtiss v. Sprague*, 49 Cal. 301; Code Civ. Proc. § 462.) The decision in that case being last in time is conclusive of the rights of the parties. (Freeman on Judgments, § 332; *Cooley v. Brayton*, 16 Iowa, 10; *Semple v. Ware*, 42 Cal. 619; *Holden v. Andrews*, 38 Cal. 119; *Carpenter v. Thompson*, 3 N. H. 204; *Megerle v. Ashe*, 33 Cal. 74.) The judgment rendered against McDonald after his death is void. (*Ewald v. Corbett*, 32 Cal. 493; *Judson v. Love*, 35 Cal. 463; *McCreery v. Everding*, 44 Cal. 284.)

A. L. Rhodes, and Wm. Leviston, for Respondents.

The McDonalds were bound by their answer both as a pleading and an appearance. (*Campbell v. Adams*, 50 Cal. 203; *Baldwin v. Morgan*, 50 Cal. 585.)

SHARPSTEIN, J. — The judgment in *McLeran v. McNamara* on its face purports to be a judgment against plaintiff's grantors, Sarah and Charles McDonald, and if they were parties to that action, such judgment was properly admitted in evidence in this case.

The McDonalds were not named in the complaint filed in *McLeran v. McNamara*, nor does it appear that the summons in that action was served on either of them by any name. Nor was the complaint amended by inserting either of their names. No order of court granting either of them leave to appear in or to defend the action, or to file an answer therein, is found in the record. But nearly seven months after the complaint was filed, and long before trial, they filed an answer denying each and every allegation of the complaint, and alleging that they were the owners and entitled to the possession of so much of the demanded premises in that action as their grantee, the plaintiff in this action, seeks to recover herein; and unless their voluntary appearance in *McLeran v. McNamara* gave the court jurisdiction of their persons, the judgment against them in that action is void for want of such jurisdiction.

In *McKinley v. Tuttle*, 42 Cal. 570, the court said: "The question is whether a judgment can be sustained against persons who are not mentioned in the complaint," and reversed the judgment because it had been rendered against persons not so mentioned. In that case the attack was direct. In this it is collateral, and if the judgment is not void it is not subject to a collateral attack.

A later case than *McKinley v. Tuttle* is *Campbell v. Adams*, 50 Cal. 203. The judgment which was held to be valid as against a collateral attack, in that case, was rendered against a person who was not named in the complaint. The summons, however, had been served on him by a fictitious name, as he stated in his answer. In that respect the case differed from

McKinley v. Tuttle. But the difference is immaterial. The decision in *McKinley v. Tuttle* rests solely on the ground that the judgment had been rendered against a person who was *not mentioned in the complaint*, and for that reason as the court held, not charged with ousting the plaintiff, or withholding the possession from him.

The voluntary appearance of a defendant is equivalent to personal service of the summons and a copy of the complaint upon him. An appearance before being summoned, confers jurisdiction equally with an appearance after being summoned. Under our practice a person who is not named in the complaint nor served with the summons, if he has an interest in the matter in litigation, may become a party by obtaining leave of the court to file a complaint in intervention. Here the McDonalds without objection or opposition filed an answer in which they denied all the allegations of the complaint, and alleged that they were the owners and entitled to the possession of a certain portion of the demanded premises. They were permitted to do without opposition, and by tacit consent, what they might have done by leave of the court. But why ask leave of the court to do that which nobody objected to their doing? They invoked the judgment of the court upon the issues raised by their answer to the complaint, and they got it. Can they now be heard to say that the judgment is a nullity because they obtruded themselves into the action? Their answer showed that they might properly have been made parties to it. And the record shows that they availed themselves of all the rights and privileges of which they could have availed themselves if they had been named and sued as defendants in the complaint. As soon as the answer was filed the complaint might have been amended by adding the names of the McDonalds to those of the other defendants in the action. Did the failure to do so affect the substantial rights of the parties? Clearly not. And if not the judgment is not affected by reason of that defect in the pleadings or proceedings. (Code Civ. Proc. § 475.)

The fact that Charles McDonald died after his answer was filed and before the trial does not, according to the weight of authority, render the judgment against him void as to those who purchased, *pendente lite*, his interest in the demanded

premises. "That a judgment against a person dead at its rendition is valid until reversed or set aside by some competent judicial authority, and that it cannot be collaterally attacked, is established by a larger preponderance of the authorities than can be brought forward to shield a judgment against a married woman from collateral assault and overthrow." (Freeman on Judgments, § 153.)

None of the cases in this State which seem to militate against this doctrine involved this question. In none of them was it a question whether such a judgment could be collaterally attacked. (*Ewald v. Corbett*, 32 Cal. 493; *Judson v. Love*, 35 Cal. 469; *McCreery v. Everding*, 44 Cal. 286.)

And if the judgment in *McLeran v. McNamara* was admissible as evidence for the defendant, as we think it was, we are unable to discover any satisfactory ground on which the ruling that the judgment in *Porter v. Woodward* was inadmissible as evidence for the plaintiff can be sustained. These judgments were rendered in actions between the same parties in respect to the same subject-matter, and the rule in such cases is, that the last judgment concludes. The argument of respondent's counsel on this point fails to convince us that this is not a case to which the rule applies. The evidence was clearly admissible in rebuttal. There was no occasion for introducing it until after the judgment in *McLeran v. McNamara* was admitted in evidence.

Judgment and order reversed.

THORNTON, J., and MYRICK, J., concurred.

[No. 9125. Department One.—May 5, 1885.]

CHARLES S. MILLIDGE, APPELLANT, v. J. D. HYDE ET AL.,
RESPONDENTS.

STATE LANDS—AFFIDAVIT FOR PURCHASE.—The affidavit accompanying an application for the purchase of State lands, other than a sixteenth or thirty-sixth section, must state the facts required by section 3500 of the Political Code; otherwise the applicant acquires no right to purchase.

APPEAL from a judgment of the Superior Court of Fresno County.

The action was brought to enforce the plaintiff's application to purchase certain indemnity or lieu lands of the State. The complaint showed that plaintiff's affidavit accompanying his application to purchase was such as is required by section 3495 of the Political Code, for the purchase of a part of a sixteenth or thirty-sixth section. It failed to state as required by section 3500 of such Code, that "there is no valid claim to such land other than that of the applicant; that he has not entered any land in part satisfaction of the unsold portion of the 500,000 acre grant, or of the grant in lieu of the sixteenth or thirty-sixth sections which, together with that now sought to be purchased, exceeds 320 acres." The further facts are stated in the opinion of the court.

Sayle & Harris, for Appellant.

Atwell & Bradley, for Respondent Hyde.

MCKINSTRY, J. — The demurrer to the complaint was properly sustained. The land which the plaintiff claims the right to purchase from the State is the northwest quarter of section 30, in township 15 south, etc. Section 3494 of the Political Code reads: —

"The unsold portion of the 500,000 acres granted to the State for school purposes, the sixteenth and thirty-sixth sections, and lands selected in lieu thereof, must be sold at the rate of one dollar and twenty-five cents (\$1.25) per acre, in gold coin, payable 20 per cent of the principal within fifty days from the date of the certificate of location issued to the purchaser; the balance, bearing interest at the rate of 7 per cent per annum in advance, is due and payable within one year after the passage of any acts by the legislature requiring such payment, or before, if desired by the purchaser."

Section 3495 provides for the form of affidavit to be made by any person desiring to purchase any portion of a sixteenth or thirty-sixth section surveyed by the United States. Section 3500 reads: —

"Any person desiring to purchase any lands mentioned in section 3494, except the sixteenth and thirty-sixth sections, must make an affidavit that he is a citizen of the United States (or

has filed his intention of becoming so), a resident of the State, of lawful age; that he desires to purchase such lands (describing the same by legal subdivisions) under the provisions of this title, and that there is no valid claim to such land other than that of the applicant; that he is an actual settler thereon; that he has not entered any land in part satisfaction of the unsold portion of the 500,000 acre grant, or of the grant in lieu of the sixteenth or thirty-sixth sections, which, together with that now sought to be purchased, exceeds 320 acres."

The northwest quarter of section 30 is not any portion of a sixteenth or thirty-sixth section, and is included in the lands mentioned in section 3494. The complaint shows that the affidavit of plaintiff did not comply with the requirements of section 3500.

It is well settled that an applicant is not entitled to purchase State lands unless his affidavit state the requisite facts. (*Hildebrand v. Stewart*, 41 Cal. 387; *Woods v. Sawtelle*, 46 Cal. 391; *Botsford v. Howell*, 52 Cal. 158.)

Judgment affirmed.

McKEE, J., and ROSS, J., concurred.

[No. 9826. Department One.—May 5, 1885.]

JAMES RHODES, APPELLANT, v. JOSEPH BORDEN,
RESPONDENT.

DISCHARGE IN INSOLVENCY—CITIZEN OF ANOTHER STATE.—An action on a promissory note which does not specify a place of payment, and which was executed in this State subsequently to the enactment of the insolvent law, in favor of one who was and continued to be a resident and citizen of another State, is not barred by the discharge of the maker from his debts under that law.

APPEAL from a judgment of the Superior Court of the county of Fresno, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Tupper & Tupper, for Appellant, cited *Newton v. Hagerman*, 10 Sawy. 460, and other cases cited in the opinion of the court.

E. D. Edwards, and J. R. Webb, for Respondent.

MCKINSTRY, J. — The action is upon promissory notes made by defendant payable to plaintiff, and delivered to the latter's agent in Fresno County; no place of payment specified. At the trial it was shown that the plaintiff, from a date long prior to the making of the notes, had been a citizen and continuously a resident of Alabama. The notes were made subsequently to the enactment of the insolvent law of this State. The only question is whether the discharge of defendant from his debts, under that law, is a bar to the action.

In the year 1812 it was determined by the Supreme Court of New York that discharge under the insolvent law of that State was a bar to a suit brought in the New York courts on a contract wherever made. (*Penniman v. Meigs*, 9 Johns. 325.) And in 1816, the Supreme Court of Massachusetts decided that a discharge under the bankrupt law of a State where the contract was made, and of which the debtor was a citizen, was a good bar to an action upon such contract in another State where the creditor resided. (*Blanchard v. Russell*, 13 Mass. 1; 7 Am. Dec. 106.)

Sturgis v. Crowninshield, 4 Wheat. 122 (A. D. 1819), concludes all doubt of the proposition that a State insolvent law, as far as it attempts to provide for the discharge of a party, as to future acquisitions of property, from debts contracted previously to the enactment of the law, is unconstitutional, because violative of the obligation of such contracts. It is equally settled that insolvent laws providing for a discharge of debts contracted subsequent to their passage do not violate the obligation of contracts. (*Ogden v. Saunders*, 12 Wheat. 213.)

In *Suydam v. Broadnax* (A. D. 1840), it was held by the Supreme Court of the United States that the certificate of discharge, under a State insolvent law, cannot be pleaded in bar of an action brought by a citizen of another State in the Circuit Court of the United States. (14 Peters, 67.)

The same court decided in 1857 that the jurisdiction of the courts of the United States over controversies arising between citizens of the United States, cannot be impaired by the laws of the States, which prescribe the modes of redress in their own

courts, or which regulate the distribution of their judicial power. (*Hyde v. Stone*, 20 How. 170.)

The decisions in the two cases last referred to seem to have turned on the proposition that the act of Congress to establish the judicial courts of the United States, gives to the Circuit Courts original cognizance of all suits of a civil nature, and the right to a citizen of one State to sue a citizen of another State in such courts; that it was intended to give suitors, having a right to sue in the Circuit Courts, remedies co-extensive with that right; and that the remedies would not be so, if any proceedings under an act of State legislation, to which the plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the Circuit Court. But in *Ogden v. Saunders*, *supra* (A. D. 1827), the action being one brought in the Circuit Court of the United States by a citizen of Kentucky against a citizen of Louisiana, it had been said by the Supreme Court that a certificate of discharge, under an insolvent law of a State, could not be pleaded in bar of an action brought by a citizen of another State "in the courts of the United States, or of any other State than that where the discharge was obtained."

It has been held that a discharge in bankruptcy under the United State statute is a bar to the claims of alien creditors. (*Murray v. De Rottenham*, 6 Johns. Ch. 58; *Ruiz v. Eickerman*, 7 Am. Dec. 60.)

Scribner v. Fisher, 2 Gray, 43, was decided by the Supreme Court of Massachusetts in the year 1854. That court was then of the opinion (Metcalf, J., dissenting) that in no case had the Supreme Court of the United States determined that a certificate of discharge, under the insolvent law of a State, was not a bar to an action on a contract, made by a citizen of the State where the discharge was granted with a citizen of another State, who does not prove his claim under those laws, if the contract by its express terms was to be performed in the State where the discharge was obtained.

The action of *Baldwin v. Hale*, 1 Wall. 223, was brought in the Circuit Court of the United States, but the opinion does not purport to decide the case upon any question arising out of the special jurisdiction of the federal courts. The Supreme Court of the United States there distinctly held: "Insolvent laws of

one State cannot discharge the contracts of citizens of other States, because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State *voluntarily becomes a party to the proceeding*, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default." The case was decided in 1863.

As late as 1868 the Supreme Court of Massachusetts does not seem to have been fully satisfied with all that was said by Mr. Justice Clifford in *Baldwin v. Hale*. In *Stoddard v. Harrington*, 100 Mass. 87, Hoar, J., speaking for that court, remarked: "The suggestion that the power of a State over the contracts of its citizens is limited by the power to make them parties to the proceedings in insolvency, does not seem to us well founded, because we think that the effect of the insolvent law qualifies the contract from its inception; and the question of the sufficiency of the notice to creditors to make them so far parties as to be bound by these proceedings does not seem to be one over which the courts of the United States have any peculiar jurisdiction." In that case, it was held that if a contract is made between two citizens of the same State, within the State, one of whom afterwards removes therefrom and becomes a citizen of another State, and the other obtains in the first State, where he continues to reside, a discharge under the insolvent law, which was in force when the contract was made, the discharge is a bar to an action against him on the contract.

The same court, however, recognizes the decisions of the Supreme Court of the United States as of paramount authority, upon a question of this nature, and in 1864 held: "The Supreme Court of the United States having decided that a discharge under the insolvent laws of this commonwealth is no bar to an action upon a promissory note given to a citizen of another State, who has not proved his claim in insolvency, although the note was payable in this commonwealth, this court will adopt and apply the same doctrine." (*Kelley v. Drury*, 9 Allen, 27.) The Supreme Court of Vermont, too, understood the judgment in *Baldwin v. Hale* as decisive of the question presented in the case now before us. In *Bedell v. Scrutin*, 54 Vt. 493, the court said:

“A discharge granted by a State court of insolvency is no bar to the claim of a non-resident creditor (citizen of another State), who does not take part in the insolvency proceedings, or submit himself in any way to the jurisdiction of the insolvency tribunal; nor is the rule affected by the place where the contract is made, or is to be performed, or the *forum* in which it is sought to be enforced.”

We are of opinion that we should adopt and enforce the doctrine of *Baldwin v. Hale*. In *Thomas v. Crow*, 65 Cal. 470, this court recognized the rule there laid down, but held that the defendant was discharged of the particular debt, represented by the promissory note sued on by an indorsee, because the discharge occurred when the note was the property of the payee, who was a citizen of this State, the note having been made and being payable here.

Judgment and order reversed.

McKEE, J., and ROSS, J., concurred.

[No. 8848. Department One.—May 6, 1885.]

THE PEOPLE EX REL. W. V. MCGARVEY, APPELLANT, v.
U. HARTWELL, RESPONDENT.

PUBLIC OFFICE—VACANCY BY NON-USER—VOLUNTARY SURRENDER BY INCUMBENT.—A public office becomes vacant by non-user, and subject to be filled by the appointing power, when the lawful incumbent voluntarily surrenders the office to another under the mistaken belief that the latter had been elected as, and was his rightful successor, and acting upon such belief for a period of two years ceases to discharge the duties of the office, and makes no demand of the person to whom he had surrendered it to be restored thereto.

APPEAL from a judgment of the Superior Court of Monterey County.

The facts are stated in the opinion of the court.

A. L. Hart, N. A. Dorn, and W. M. R. Parker, for Appellant.

The office of tax collector has never been vacant. An office is not vacant where there is a *de facto* incumbent.

Defendant has always, since the relator gave him the office, been the *de facto* tax collector, and the most that can be said is that the relator has allowed another person to perform the duties of his office.

D. M. Delmas, W. H. Webb, and James A. Wall, for Respondent.

MCKEE, J. — Under the provisions of chapter 5, title 10, of the Code of Civil Procedure, this action was commenced to oust defendant from the office of tax collector of Monterey County, and reinstate the relator. The court by its judgment ousted the defendant, but refused to reinstate the relator; and from so much of the judgment as denied the right of the plaintiff to the office, the relator as well as the people appeal.

The judgment was rendered upon a finding of facts which shows that the relator was the duly qualified tax collector of Monterey County from March, 1878, until the first Monday of March, 1880, during which time he continued to discharge the duties of the office. But on the last-named day he voluntarily surrendered the office to the defendant upon the mistaken belief that the defendant, who had been elected, at the general election of 1879, treasurer of Monterey County, was *ex-officio* tax collector of the county, and his rightful successor in office. Upon that belief he acted for two years, during all which time he ceased to discharge the duties of the office, and made no demand of the defendant, to whom he had surrendered it, to be restored thereto.

Public office is held upon the implied condition of diligently and faithfully executing the duties belonging to it; and a wilful refusal to perform the duties works a forfeiture. (*King v. Rook*, 2 Raym. Ld. 237; *Rex v. Wells*, 4 Burr. 2004.) By the surrender and non-user of the office for a period of two years relator therefore forfeited his right to it. The office became vacant. Section 996 of the Political Code provides: —

“An office becomes vacant . . . by the incumbent’s ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the State by permission of the legislature.”

And being vacant, it was subject to be filled by the appointing power. (Section 4115, Pol. Code.)

Judgment affirmed.

McKINSTRY, J., and ROSS, J., concurred.

[No. 8630. Department One.—May 6, 1885.]

P. B. GALLAGHER, RESPONDENT, v. MARKET STREET RAILWAY COMPANY OF SAN FRANCISCO, APPELLANT.

EVIDENCE—MEDICAL WORKS.—In an action to recover damages for personal injuries, a medical book, although proved to be of standard authority, is not admissible in evidence to prove the nature and probable effect of the injuries.

ID.—The books to which a medical expert refers cannot be resorted to in order to support his testimony, but they may be used to contradict or discredit him.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

McAllister & Bergin, for Appellant.

G. D. Buckley, for Respondent.

McKEE, J. — This was an action to recover damages for personal injuries caused by the wrongful expulsion of the plaintiff, by an officer of the defendant, from one of its street cars. On the trial of the questions at issue in the case *J. M. Sharkie* was called and sworn as a witness on behalf of the plaintiff, and testified that he was a physician and surgeon by profession, and had been in practice since 1849. Thereupon a book, entitled "A System of Surgery, Pathological, Diagnostic, Therapeutic and Operative," by Samuel D. Gross, published in Philadelphia, was exhibited to the witness, and he was asked:—

"Are you acquainted, sir, with 'Gross on Surgery?'" In response to which the witness answered:—

"Yes; it is recognized as a standard work on surgery

and I consider it good authority on the subject on which it treats."

This was all the testimony given by the witness. No questions were asked him, in connection with the book or otherwise, as to the alleged injuries, which were the subject-matter of the action. But upon the testimony of the witness, counsel for the plaintiff insisted upon his right "to read from said book, as though the author were a witness then and there present in court, and testifying in the case before the jury"; and in the exercise of that asserted right, he offered to read in evidence extracts from the book upon the following propositions: (1) That wounds to joints are very dangerous, no matter how trivial. (2) That lacerated wounds are more to be dreaded than incised wounds. (3) That the larger the joint the more danger from the wounds. (4) That ankylosis, or stiffening of the knee, may set in from the most trifling wounds of the joints. (5) That a tendon may be impaired or may be injured without the consequence of much inflammation, etc.

To the right of the plaintiff to read the book, or any part of it, as evidence, and to each offer of evidence, as it was made, and to the reading of the book at all, the defendant objected upon the ground that nothing contained in the book was relevant, material, or competent evidence, but the objections were severally overruled, and the plaintiff read the book, at great length, to the jury, as evidence. In *People v. Wheeler*, 60 Cal. 581, we held it was error to permit the district attorney, against the objection of the defendant, in the trial of a criminal action, to read in his closing argument to the jury as part of his argument, excerpts from "Brown's Medical Jurisprudence of Insanity," which tended to sustain the theory of the prosecution upon the question of the insanity of the defendant — one of the questions at issue in the case — without having given the book in evidence or proved that it was a work of standard authority. But in this case such preliminary proof was made, and being made, the book was offered and read in evidence. The question therefore arises, whether a medical book, containing the author's opinions and views upon the subject of which it treats, is admissible in evidence to prove the nature of injuries sustained by the plaintiff in the action, and their probable effect?

Under common-law procedure it was not competent to read books of science to a jury as evidence, because the statements therein contained were not only wanting in the sanctity of an oath, but were made by one who was not present, and was not liable to cross-examination. For that reason they were excluded, notwithstanding the opinion under oath of scientific men, that they were books of authority. (*Ashworth v. Kittridge*, 12 Cush. 193; *Commonw. v. Wilson*, 1 Gray, 67; *Washburn v. Cuddihy*, 8 Gray, 430; *Melvin v. Easley*, 1 Jones (N. C.) 387; *Carter v. State*, 2 Ind. 617; *Fowler v. Lewis*, 25 Tex. 380.)

But it is contended that the common-law rule has been changed by the Code law. Section 1936 of the Code of Civil Procedure makes "historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, . . . *prima facie* evidence of facts of general notoriety and interest," and the question arises, whether such books, which were not regarded before the adoption of the Codes as competent evidence, are not, by force of that provision of the Code, made competent. Doubtless the intention of that legislation was to extend the rule of evidence rather than to restrict it. But the extension is limited by the terms "facts of general notoriety and interest."

What are "facts of general notoriety and interest?" We think the terms stand for facts of a public nature, either at home or abroad, not existing in the memory of men, as contradistinguished from facts of a private nature existing within the knowledge of living men, and as to which they may be examined as witnesses. It is of such public facts, including historical facts, facts of the exact sciences, and of literature or art, when relevant to a cause that, under the provisions of the Code, proof may be made by the production of books of standard authority. So Mr. Justice Story, in *Morris v. The Lessees of Harmer's Heirs*, 7 Peters, 558, speaking upon this subject, says: "Historical facts of general and public notoriety may indeed be proved by reputation, and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not pre-suppose better in existence; and where from the nature of the transaction or the remoteness of the period, or the

public and general reception of the facts, a just foundation is laid for general confidence. But the work of a living author, who is within the reach of the process of the court, can hardly be deemed of this nature." And the appellate court of New York says: "Such evidence is only admissible to prove facts of a general and public nature, and not those which concern individuals or mere local communities." (*McKinnon v. Bliss*, 21 N. Y. 210. See also, *Bogardus v. Trinity Church*, 4 Sand. 633; *Missouri v. Kentucky*, 11 Wall. 395.)

Such facts include the meaning of words and allusions, which may be proved by ordinary dictionaries and authenticated books of general literary history, and facts in the exact sciences founded upon conclusions reached from certain and constant data by processes too intricate to be elucidated by witnesses when on examination. (1 Whart. Ev., § 667.) Thus mortuary tables for estimating the probable duration of the life of a party at a given age, chronological tables, tables of weights, measures and currency, annuity tables, interest tables, and the like, are admissible to prove facts of general notoriety and interest in connection with such subjects as may be involved in the trial of a cause. (*Wagar v. Schuyler*, 1 Wend. 533; *Schell v. Plumb*, 55 N. Y. 592; *Mills v. Catlin*, 22 Vt. 98; *Donaldson v. Missouri R. R. Co.*, 18 Iowa, 291.)

But medicine is not considered as one of the exact sciences. It is of that character of inductive sciences which are based on data which each successive year may correct and expand, so that, what is considered a sound induction last year may be considered an unsound one this year, and the very book which evidences the induction, if it does not become obsolete, may be altered in material features from edition to edition, so that we cannot tell, in citing from even a living author, whether what we read is not something that this very author now rejects. (Whart Ev., § 665.) And as we said in *Wheeler's case*, *supra*, "if such treatises were to be held admissible, the question at issue might be tried, not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories."

Of course, the author himself, or any other physician, may be called upon to testify to opinions and professed facts, which

may be relevant to a cause on trial, derived by him not only from his experience or observation, but also from standard authorities which he may have read and studied in the line of his profession. Such testimony is admissible on the maxim of *cuiuslibet in arte sua credendum*; and it comes from one who, like every other witness, testifies under the solemnity of an oath, and is subject to cross-examination as to his conclusions; and the jury have the right to weigh his evidence and determine how far his conclusions are probable or authoritative. But where his testimony as an expert may be founded on standard authorities, to which he refers in his direct testimony, even under such circumstances, the witness cannot resort to the books to which he refers to support his testimony. So in *Commonw. v. Sturtevant*, 117 Mass. 122, where an expert, in his direct testimony, was asked if he concurred with the views expressed in "Taylor's Medical Jurisprudence" on the subject of his testimony, and the book was passed to him to read therefrom to the jury the opinions in the book, with which he concurred, it was held that it could not be done. (See also *Commonw. v. Brown*, 121 Mass. 69-75.) This as a general rule is sustained by the great weight of authority; but it is subject to this exception, namely, that books referred to by an expert, to sustain the opinions which he has expressed, may be used to contradict him or to discredit him. Thus, in *Huffman v. Click*, 77 N. C. 55, where a physician in his testimony referred to "Hammond's Work on the Diseases of the Nervous System," the book was admitted in evidence for the purpose of discrediting him. To the same effect will be found *City of Ripon v. Bittel*, 30 Wis. 619, and *Pinney v. Cahill*, 48 Mich. 584.

In the trial of the latter case a veterinary surgeon, examined as an expert, in his direct examination gave it as his opinion that the injury, which was the subject-matter of the action, was attributable to a certain cause, which he undertook to define, and to support his opinion and definition, referred to a standard work known as the "Modern Horse Doctor," by Dr. Dodd. Upon his cross-examination the work was offered and admitted in evidence for the purpose of discrediting him; and the Supreme Court said it was rightly admitted, because "the expert borrowed credit for the accuracy of his statement by

referring his learning to the books before mentioned, and by implying that he echoed the standard authorities like Dodd. Under the circumstances it was not improper to resort to the book, not to prove the facts it contained, but to disprove the statement of the witness, and enable the jury to see that the book did not contain what he had ascribed to it." The objection to the admissibility of the book in evidence should have been sustained.

Judgment and order reversed and cause remanded for a new trial.

Ross, J., and McKINSTRY, J., concurred.

[No. 8427. Department One.—May 8, 1885.]

WILLIAM ASHURST, RESPONDENT, v. W. A. FOUNTAIN
ET AL., APPELLANTS.

ESTATES OF DECEASED PERSONS—CITATION—SERVICE BY PUBLICATION.—

A citation in probate proceedings must be served in the same manner as a summons in a civil action, and where the person to be served has departed from the State, service may be made by publication.

APPEAL from a judgment of the Superior Court of Fresno County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Clinton L. White, for Appellants, cited *Estate of Aveline*, 53 Cal. 259.

H. S. Dixon, for Respondent.

MCKINSTRY, J.—The action is against the sureties on the undertaking of an administrator.

The complaint avers "that on the 11th day of April, 1881, said court (in which the settlement of the estate was pending) caused a citation to issue to said J. E. Dixon (the administrator), to render his final account of his administration of said estate; but as said plaintiff is informed, believes, and here charges, said citation could not, and no other can now, be served upon

said J. E. Dixon, by reason of the fact that he has departed from this State," etc.

The citation as appears from the complaint and findings was never served. A citation must be served in the same manner as a summons. (Code Civ. Proc., § 1709.) A summons may be served on one who has departed from the State by publication. (Code Civ. Proc., §§ 412, 413.) The *personal* notice mentioned in section 1710 is personal notice as distinguished from notice which, in the first instance, and only, is required to be made by a publication.

It may be said that the only consequences of a failure of an administrator to account, when cited, are that he may be attached or removed from office. But even if it should be conceded that this were so, we could not assume that the administrator would have failed to appear and render an account, had the citation been served. The present action cannot be maintained, because the power of the Probate Court to secure the appearance of the administrator at a settlement, which would have been conclusive of the rights of these defendants, has not been exhausted.

Judgment and order reversed, and cause remanded for further proceedings.

McKEE, J., and ROSS, J., concurred.

[No. 8561. In Bank.—May 12, 1885.]

R. S. CLAY ET AL., RESPONDENTS, v. PATRICK CARROLL,
APPELLANT.

PLEADING—COUNTER-CLAIM—JOINDER OF CAUSES OF ACTION—DEMURRER.—In an action founded on contract, an answer which joins by way of counter-claim, causes of action for goods, wares, and merchandise sold and delivered, for money paid, laid out, and expended, and for money had and received, is not demurrable under the Code, if such pleading would have been sufficient as a declaration at common law.

APPEAL from a judgment of the Superior Court of Merced County.

The facts are stated in the opinion of the court.

Bennett & Wiggington, for Appellant.

J. K. Low, for Respondents.

MORRISON, C. J.—In an action for the recovery of money brought by plaintiffs against the defendant in the Superior Court of the county of Merced, the defendant, by way of counter-claim, filed the following answer:—

“And for a further and separate answer, and by way of counter-claim, this defendant alleges that, at and before the commencement of this suit, the said plaintiffs were, and now are, justly and legally indebted to this defendant in a large sum and amount of money, to wit, the sum of \$2,000, or thereabouts, over and above all set-offs, claims, demands, counter-claims, or otherwise, for and on account of a large number of mules, grain, hay, wheat, barley, pasturage, hogs, farm supplies, implements of husbandry, and a steam-engine for farming purposes, and goods, wares, and merchandise, theretofore sold, furnished, and supplied and delivered by this defendant, to and for the plaintiffs, at their special instance and request; and also in a further large sum and amount of money, to wit, \$2,000, or thereabouts, for money theretofore paid, laid out, and expended and advanced, by this defendant, for the said plaintiffs, at their special instance and request; and also in a further large sum and amount of money, to wit, \$2,000 theretofore had and received by the plaintiffs to, and for the use of the defendant, at their special interest and request; and that afterwards, to wit, before the commencement of this suit, said plaintiffs, being so indebted to this defendant as aforesaid, undertook and promised to pay to this defendant the said several sums of money above mentioned.”

The foregoing answer, although not very skillfully drawn, may be likened to a declaration at common law containing the three counts for goods, wares, and merchandise sold and delivered, for money paid, laid out, and expended, and for money had and received. This form of pleading is good under our system and has been so recognized. (*Buckingham v. Waters*, 14 Cal. 146.)

To the foregoing answer or counter-claim the plaintiffs interposed a demurrer on the grounds, *first*, that the same did not

state facts sufficient to constitute a defense to the action; *second*, that several causes of counter-claim were improperly joined; and *third*, that the answer or counter-claim was ambiguous and unintelligible. The demurrer was sustained and judgment was rendered for the plaintiffs, independent of and without considering the counter-claim set up by the defendant.

The matters of counter-claim are separately stated in the answer and with sufficient certainty. There is no such ambiguity about the pleading as makes it obnoxious to a demurrer, and as has already been remarked, it would be sufficient in a declaration at common law. (*Wilkins v. Stidger*, 22 Cal. 231; *Quinn v. Smith*, 49 Cal. 163.)

Judgment reversed.

THORNTON, J., MCKINSTRY, J., and SHARPSTEIN, J., concurred.

Rehearing denied.

[No. 20045. Department Two.—May 14, 1885.]

THE PEOPLE, APPELLANT, v. C. D. PLATT, RESPONDENT.

PERJURY—INSOLVENCY—FALSE VERIFICATION—OMISSION OF PROPERTY FROM SCHEDULE.—A petitioner in insolvency is guilty of perjury in verifying his petition, schedule, and inventory in the form and manner prescribed by the Insolvent Act of April 16, 1880, if he wilfully omits from his schedule any of his property. The provision in the insolvent act making such omission a misdemeanor does not affect the statute against perjury.

ID.—INFORMATION—DESCRIPTION OF PROPERTY OMITTED.—The information described the property alleged to have been omitted from the schedule as "consisting among other things of diamonds, watches, jewelry, money, and other personal effects belonging to him and his estate." *Held*, that the description was sufficiently definite and certain.

APPEAL from an order of the Superior Court of Los Angeles County sustaining a demurrer to an information.

The defendant was informed against for the crime of perjury, alleged to have been committed in falsely swearing to the correctness of certain schedules and inventories filed by him in

insolvency proceedings instituted under the Insolvent Act of April 16, 1880. The further facts are stated in the opinion of the court.

Attorney-General Marshall, for Appellant.

J. F. Godfrey, and *Howard & Roberts*, for Respondent.

SHARPSTEIN, J.—It seems to be conceded that a petitioner in insolvency who should wilfully omit from his schedule any of his property, and then verify his petition, schedule, and inventory in the form and manner prescribed by law, would be guilty of perjury, were it not for a provision in the insolvent act which makes such omission a misdemeanor. And the respondent insists that the latter act “creates a misdemeanor of what before was a felony,” and that “the old law is gone by reason of the repugnance, and the offender can only be indicted under the new.” But the latter act does not make the verification of a schedule by a petitioner from which he has wilfully omitted some of his property a misdemeanor. If he “fraudulently or designedly omits from his schedule any property or effects whatsoever . . . he shall be deemed guilty of a misdemeanor.” We cannot discover any repugnancy or inconsistency between that and a statute which makes the verification of a false schedule by a petitioner who knows it to be false, a felony. “The invariable rule of construction in respect to the repealing of statutes by implication is, that the earliest act remains in force, unless the two are manifestly inconsistent with and repugnant to each other.” (*Bowen v. Lease*, 5 Hill, 221.) “It is necessary to the implication of a repeal that the objects of the two statutes be the same. If they are not, both will stand though they may refer to the same subject.” (*United States v. Clafin*, 97 U. S. 546.) Here the objects of the two statutes are not the same. And as was said in *Ramson v. Ramson*, 52 Ill. 62: “The acts are not upon the same subject, and if the rule be, as it undoubtedly is, that a subsequent act upon the same subject will not be held to repeal a former act by implication, unless the new act contains provisions contrary to, or irreconcilable with those of the former act, with much more force and propriety may it be argued that a subsequent act, not

on the same subject, shall not be construed to repeal a former act by mere implication."

We are unable to find anything in the insolvent act which indicates that it was the intention of the legislature to make that a misdemeanor which was a felony before. That which it declares shall be deemed to be a misdemeanor was neither a misdemeanor nor a felony before.

The allegation that the defendant "wilfully concealed a large amount of property, consisting among other things of diamonds, watches, jewelry, money, and other personal effects belonging to him and his estate," seems to us to be sufficiently definite and certain. The defendant swore that his schedule and inventory contained a full, perfect, and true discovery of all his estate, real, personal, and mixed goods and effects. The charge is that he wilfully omitted from his schedule the property above mentioned. A minute description of the property might be impossible; and if exacted, might defeat the ends of justice, as a variance between the proof and allegation would be fatal. We think the defendant is sufficiently apprised by the information of the charge which he must be prepared to meet on the trial. If innocent, there is no more danger of his being convicted than there would be if the property had been described with the greatest minuteness, although his chance of escape, if guilty, might have been much better if it had been so described.

Judgment reversed, with directions to the court below to overrule the demurrer to the information, with leave to the defendant to plead thereto as he shall be advised.

THORNTON, J., and MYRICK, J., concurred.

[No. 9917. Department Two.—May 14, 1885.]

PRESENTACION BALLESTERAS DE HALEY, RESPOND-
ENT, v. SALISBURY HALEY, APPELLANT.

DIVORCE—CORROBORATIVE TESTIMONY.—In an action for divorce on the ground of extreme cruelty, the complaint alleged that the defendant had been guilty of cruel and inhuman treatment of the plaintiff, in that he had accused her of having committed adultery, and that in consequence of such accusation her mental suffering was so great that she became physically ill, and her health endangered. The only evidence in corroboration of the plaintiff's testimony was that of her attorney and another person in reference to statements made by the defendant in conversations of a friendly and confidential character, sought by the plaintiff's attorney with her knowledge, and with a view to settle matters between the parties, there being no evidence that the statements were made with any wanton or cruel intent, or that they produced any effect upon the plaintiff. *Held*, that the testimony of the plaintiff was uncorroborated within the meaning of section 130 of the Civil Code.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

H. Allen, for Appellant.

John F. Godfrey, for Respondent.

MYRICK, J.—This is an action for divorce on the ground of extreme cruelty. The plaintiff alleged the marriage of herself and defendant on the 7th of June, 1884, and that the defendant had since then been guilty of cruel and inhuman treatment of her, in that he had accused her of having committed adultery, and that in consequence of such accusations her mental suffering was so great that she became physically ill and her health endangered, and she could not with safety to her mental or physical health continue to live with him, and for that reason she was obliged to leave his home and seek shelter elsewhere.

The plaintiff was examined as a witness in her own behalf, and her testimony tended to fully sustain the allegations of the complaint. According to section 130 of the Civil Code, no divorce can be granted upon the uncorroborated testimony of the parties. It was therefore necessary for the plaintiff to produce evidence other than her own testimony as to the truth

of her allegations. This was attempted to be accomplished in the following way: After she separated from the defendant she consulted with an attorney in reference to her grievances. The attorney was friendly to the defendant, and told her he would see Haley and talk with him, and ask him to get an attorney [naming him], and perhaps they [the attorneys] could arrange it so if the plaintiff and defendant could not agree, a divorce could be got with little expense, scandal, and notoriety. Plaintiff's attorney thereupon had an interview with defendant; and subsequently another interview occurred between the same parties, during a portion of which another person was casually present and heard some of the conversation. The plaintiff's attorney was examined as a witness on her behalf, as was the other person, and it is claimed on behalf of plaintiff that the testimony of these witnesses corroborated the testimony of plaintiff. It may be here stated that independent of the plaintiff and these two witnesses, no evidence was given tending to prove the allegations of extreme cruelty. We are of opinion that the testimony of plaintiff's attorney, and of the other person, did not in any material respect corroborate the testimony of the plaintiff in regard to the averments of the complaint. The statements of the defendant as testified to by these witnesses, were made in conversations of a friendly and confidential character, sought by plaintiff's attorney with her knowledge, and with a view to settle matters between the parties. There is no evidence that they were made with any wanton or cruel intent, or that they produced any effect upon her; they were merely statements of what he professed to believe to be true, together with his reasons for so believing. There was no evidence other than that of plaintiff, of any accusations made by defendant before she left his house, nor that she left his house, or underwent any suffering in consequence of any such accusations. We do not think that the testimony of the plaintiff was corroborated.

Judgment and order reversed and cause remanded for new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 8946. Department Two.—May 14, 1885.]

M. WATERMAN ET AL., APPELLANTS, v. ISAAC LIPMAN
ET AL. A. A. LOUDERBACK, RESPONDENT.

PROCEEDINGS AGAINST JOINT DEBTORS—AMENDMENT OF ORIGINAL PLEADINGS.—Proceedings under sections 989 to 994 of the Code of Civil Procedure, for the purpose of binding a partner by a judgment recovered against his copartner, are in the nature of an action upon a judgment; neither the pleadings nor the judgment in the original action can be amended.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

E. B. Young, and *E. N. Deuprey*, for Appellants.

Davis Louderback, for Respondent.

MYRICK, J. — Waterman, Truebenbach, and Waterman, alleging themselves to be partners under the name of Waterman & Co., commenced an action against Lipman, Louderback, and Cushing, to recover amounts alleged to be due on certain promissory notes. Lipman alone was served with summons, and on his failure to answer, judgment was entered against him. Some four years thereafter the plaintiffs took proceedings under sections 989 to 994 of the Code of Civil Procedure, for the purpose of obtaining an order that Louderback be bound by the judgment which had been entered against Lipman. Louderback denied the partnership of the defendants and their indebtedness as such, and averred that plaintiffs had not complied with sections 2466 and 2468 of the Civil Code. On the hearing plaintiffs offered as proof that they had complied with said sections 2466 and 2468, a certificate and proof of publication which stated that the firm of Waterman & Co. consisted of the above-named Waterman, Truebenbach, and Waterman, and also one Phister; also that said Phister was a member of said firm. Plaintiffs also asked leave to amend their complaint in the original action by adding the name of Phister as a member of the firm of Waterman & Co. The motion was denied, and subsequently a judgment of nonsuit was granted, from which plaintiffs appealed.

The rulings of the court below were correct. As is said by respondent in his brief, Louderback was summoned to show cause why he should not be bound by a judgment which Waterman, Truebenbach, and Waterman had obtained against Lipman, not one obtained by Phister and the others; this proceeding is in the nature of an action upon a judgment, where the pleadings in the former action cannot be amended, nor could the judgment against Lipman be amended.

Judgment affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 9881. Department Two.—May 14, 1885.]

THE TROJAN MINING COMPANY, APPELLANT, v. THE
FIREMEN'S INSURANCE COMPANY OF BALTI-
MORE, RESPONDENT.

FIRE INSURANCE—PLEADING.—The complaint in an action on a fire insurance policy alleged that a watchman was employed by plaintiff in and upon the premises day and night, and *was upon* the premises at the time of the fire. The answer denied that a watchman was in and upon the premises day and night, and averred that at the time of the fire no watchman was in and upon the premises. *Held*, that the denial is sufficient, and presents an issue as to whether or not the watchman was there.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Geo. W. Tyler, for Appellant.

Fox & Kellogg, and *T. C. Van Ness*, for Respondent.

The COURT. — Action on a fire insurance policy. The policy contained the following clause: —

“It is agreed and understood that during such times as the above works are idle a watchman shall be employed by the assured, to be in and upon the premises day and night.”

The allegation in the complaint on that subject is as follows:
“That at the time of such fire, and for some time prior thereto,

the works of said corporation, so assured, as aforesaid, were idle, but during all said time a watchman was employed by plaintiff in and upon the premises day and night, and said watchman was upon said premises at the time of said loss and damage, as aforesaid."

The denial is as follows: "And defendant denies, and says it is not true, as alleged in said complaint, or at all, that during all the time the works of said corporation were idle, as alleged in said complaint, a watchman was in and upon the premises day and night."

In the answer there is also an allegation as follows: "That at the time said fire occurred, and for more than two hours prior thereto, no watchman was in and upon the premises upon which said works, insured as aforesaid, were situated."

It is contended by plaintiff, that the allegation of the complaint as to the watchman is not denied. The complaint states that a watchman was employed by plaintiff *in and upon* the premises day and night and *was upon* the premises at the time of the fire. The answer denies that a watchman was in and upon the premises day and night, and avers that at the time of the fire, and for more than two hours prior thereto, no watchman was in and upon the premises. The denial seems to us to be plain and unequivocal. The appellant urges that by the terms of the policy it was to *employ* a watchman to be in and upon the premises, and if the watchman stayed away, the insurer is not exonerated, under section 2629 of the Civil Code. If there is any difference in the meaning of the words used in the policy and those used by the pleader, the latter seems to have attached to them the meaning that the watchman, employed by the plaintiff, *was in and upon* the premises day and night (not that he was employed to be there and neglected his employment), and, moreover, the plaintiff alleged that he was there at the time of the fire; and thus the issue was presented as to the fact whether or not the watchman was there. On this subject the court found as follows:—

"That during the time that said premises were so idle and unoccupied, plaintiff failed to and did not keep a watchman in and upon, or in or upon, said insured premises day and night. That no watchman was in and upon, or in or upon, said insured

premises nightly from and after the hour of 10 o'clock, or thereabouts, until an early hour of each morning thereafter. That no watchman was in and upon, or in or upon, said insured premises between the hours of 10 o'clock P. M., or thereabouts, on the evening preceding the fire alleged in the complaint of plaintiff, and the hour when said fire occurred. That a watchman employed by plaintiff to watch the insured premises slept nightly in a small building located across the road from said insured premises, and from 100 to 120 feet, or thereabouts, distant therefrom. That said building was owned by plaintiff, but was situate upon ground not owned by plaintiff. That the watchman so employed as aforesaid kept a watch dog in the insured building, which had the whole range of the building on the inside, and was accustomed to bark loudly when any stranger approached said building."

The evidence is not before us. The findings respond to the issues, and clearly show that plaintiff was not entitled to recover.

It is unnecessary to notice the other points presented, as the above disposes of the case.

The judgment is affirmed.

[No. 8782. Department Two.—May 16, 1885.]

F. W. STECHHAN, RESPONDENT, v. FRANK RORABACK
ET AL., APPELLANTS.

UNDERTAKING FOR ARREST—ACTION ON—JUSTICE'S COURT—APPEAL.—A defendant in an action commenced in a Justice's Court, who has been arrested and subsequently discharged by the justice, cannot maintain an action on the undertaking given to procure his arrest, while an appeal by the plaintiff to the Superior Court from the judgment of the justice remains undetermined.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

W. H. Allen, P. B. Ladd, and J. W. Harding, for Appellants.

The appeal to the Superior Court suspended the judgment of the Justice's Court for all purposes. (*Knowles v. Inches*, 12

Cal. 213; *Woodbury v. Bowman*, 13 Cal. 635; *People v. Frisbie*, 26 Cal. 135; *People v. Treadwell*, 66 Cal. 400; *McGarrahan v. Maxwell*, 28 Cal. 91; *McGarrahan v. New Idra Mining Co.*, 49 Cal. 331; *Thornton v. Mahoney*, 24 Cal. 569.) The present action having been commenced pending such appeal, was prematurely brought. (*United States v. Pacheco*, 20 How. 263; *Freeman on Judgments*, § 328; *Bryne v. Prather*, 13 La. An. 653; *Clark v. Clayton*, 61 Cal. 634; *Dougherty v. Dore*, 63 Cal. 170.)

Baggett & Platt, for Respondent.

The COURT. — The defendant Roraback commenced an action against Stechhan in a Justice's Court, and procured an order for his arrest. In procuring such order Stechhan gave an undertaking, with the other defendants herein as sureties. On the trial of the action, the justice held the arrest to have been wrongful and without cause, and discharged Stechhan. This action is on the undertaking. The defendants herein in their answer averred that after the judgment in the Justice's Court, Roraback, plaintiff therein, appealed from such judgment to the Superior Court, and that such appeal was still untried and undetermined. This portion of the answer was demurred to, and the demurrer sustained. We are of opinion that this ruling was error. On the appeal the whole case was for hearing and determination, including the question whether or not the arrest was wrongful or without sufficient cause; and until such determination it could not be known whether liability on the undertaking had been incurred.

Judgment and order reversed and cause remanded, with instructions to overrule plaintiff's demurrer to defendant's answer in the particular above noted. The demurrer was properly sustained as to the other ground therein stated.

[No. 20078. Department Two.—May 16, 1885.]

THE PEOPLE, RESPONDENT, v. WONG AH YOU,
APPELLANT.

CRIMINAL LAW—CONVICTION—INSUFFICIENCY OF EVIDENCE—LARCENY.
—When the evidence is otherwise insufficient to justify the verdict, a conviction for larceny cannot be sustained by the mere fact that the defendant when a witness in his own behalf, made a false statement as to a matter in no way connected with the crime of which he was accused.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The defendant was convicted of the crime of grand larceny in having stolen a sum of money belonging to the complaining witness, in whose house he was employed as a servant. The further facts are stated in the opinion of the court.

C. B. Darwin, for Appellant.

Attorney-General Marshall, for Respondent.

SHARPSTEIN, J. — Beyond the fact that the defendant having access to the house and to the rooms in which the missing money was kept, the only circumstance which militates in any degree against him is his statement that when he returned from Sunday-school he found the door through which he entered the house open, while a witness who was in the house at the time testifies that the defendant unlocked the door before entering. There is no evidence that the stolen property or any portion of it was ever in the possession of the defendant, or that he knew where it was kept. The evidence is that none of it has ever been discovered since it was first missed. Therefore the statement of the defendant that he found the door open was not made for the purpose of explaining his possession of the stolen property. The most that can be claimed is, that he made it for the purpose of averting suspicion from himself. That he would naturally desire to do, whether guilty or innocent. It is not claimed that his unlocking the door had any connection with the alleged crime. Nor is it claimed that he had not a right to unlock it, or that he had not been furnished with a key for that purpose.

He had been a servant in the house for a period of twenty-seven months, and seems to have been very much trusted.

We think that the bare circumstance of his having made a false statement in regard to a matter in no way connected with the crime of which he is accused, is insufficient to justify the verdict, and for that reason his motion for a new trial should have been granted.

Judgment and order reversed, and cause remanded for a new trial.

MYRICK, J., and THORNTON, J., concurred.

[No. 8326. Department One.—May 19, 1885.]

TOWNSEND WOOD, RESPONDENT, v. CHRIS. FRANKS,
APPELLANT.

PARTNERSHIP—ASSUMPTION OF FIRM NOTE—CONSIDERATION.—A promise by one partner to assume the payment of a note executed in favor of the firm, and to charge himself with the amount thereof on the firm books, is a sufficient consideration to sustain a transfer of the note to him by the partnership.

INSOLVENT—TRANSFER OF PROPERTY TO CREDITOR—FRAUDULENT CONVEYANCE.—Neither part ii., title iii., of the Civil Code, nor the statute of frauds, prevent a debtor, admittedly insolvent, from transferring his property directly to his creditor, either absolutely in payment of his debt, or as security by way of mortgage.

ID.—CHATTEL MORTGAGE—FUTURE ADVANCES—QUESTION OF FRAUD FOR JURY.—A chattel mortgage given for a greater sum than is due by the mortgagor to the mortgagee, to secure both a present indebtedness and future advances, is not fraudulent in law as to creditors of the mortgagor, because given for a greater sum than is due, even though the mortgage does not express upon its face that the excess is for future advances. Whether such mortgage was given in good faith is a question for the jury.

APPEAL from a judgment of the Superior Court of Monterey County, and from an order refusing a new trial.

On the 7th of May, 1878, Peter Heron was indebted to the firm of Wood, Dutcher & Co., J. K. Alexander, Goodall, Perkins & Co., and the Salinas City Bank, in the aggregate sum of \$1,487.25. Being desirous of paying the same, he executed to the firm of Wood, Dutcher & Co. his promissory note for that amount, under an agreement, that the payee should assume and

pay the indebtedness to the other creditors named above. On the same day Wood, Dutcher & Co. transferred the note to the plaintiff. Subsequently Heron executed to Wood, to secure the payment of the note, a chattel mortgage on his growing crops, which was duly recorded. A few hours afterwards Wood charged himself on the firm books with the full amount of the note and mortgage, and thereupon paid all of the assumed claims. The defendant, as sheriff, afterwards levied upon and took into his possession the mortgaged crops, under an attachment issued in an action against Heron. At the time of the levy and subsequently, the plaintiff demanded of the defendant the payment of the amount due on the note and mortgage, but the defendant did not pay or tender any part thereof, or deposit the same with the county clerk or county treasurer subject to the order of the plaintiff. The present action was brought to recover of the sheriff the amount of the mortgage debt. The case is reported on a former appeal in 56 Cal. 217. The further facts appear in the opinion of the court.

D. M. Delmas, Wm. H. Webb, and Jas. A. Wall, for Appellant.

Garber, Thornton & Bishop, S. F. Geil, and S. M. Swinnerton, for Respondent.

The COURT. — 1. The complaint is not subject to general demurrer. (*Wood v. Franks*, 56 Cal. 217.)

2. It is contended that plaintiff acquired no rights through the mortgage, because no consideration passed for the transfer of the note from Wood, Dutcher & Co. to the plaintiff; in other words, that the plaintiff was not the actual owner of the promissory note which the mortgage was given to secure, or of the indebtedness by it represented.

There was evidence tending to prove that prior to the making of the note by Heron to the partnership, Wood, Dutcher & Co., it was agreed, between plaintiff and other members of the firm, that plaintiff should take an assignment of the note, and that its amount should be charged against him. The note was indorsed to plaintiff before the mortgage was executed; but he did not charge himself with it, on the books of the firm, until several

hours afterward. By reason of his promise that he would take the note and charge the amount of it against himself, he became liable to the firm for that amount when he, in the name of the partnership, indorsed it to himself. The entry in the firm books was but further evidence of an indebtedness to the firm already existing.

3. If the instrument, executed and delivered by Heron to the plaintiff, had been made to secure only, *first*, the payment of the note to the Salinas City Bank, made by Heron and plaintiff, the latter as surety, and *second*, the debt from Heron to Wood, Dutcher & Co., assigned to plaintiff, it would not have been an attempted "assignment," within the meaning of the word as used in part ii., title iii., of the Civil Code; nor could it have been an attempt to create a trust for the use of the mortgagor, such as is prohibited by the statute of frauds. (*Dana v. Stanfords & Deitz*, 10 Cal. 269.) The statutes were not intended to prevent a debtor, admittedly insolvent, from transferring his property directly to his creditor, either absolutely in payment of his debts, or as security by way of mortgage.

In *Lawrence v. Neff*, 41 Cal. 566, it was held that the instrument therein spoken of, if considered a mortgage, was valid as to creditors not referred to in it, at least to the extent of creating a lien in the amount of the debt due to the mortgagee, although it was given as appears on its face, to secure other creditors than the mortgagee. This much is involved in the decision of that case, even if those parts of the opinion which in terms declare that the instrument was not an "assignment," under section 39 of the Insolvent Law of 1852, should be disregarded as mere *dicta*.

The effect of the judgments in the two cases above cited is to determine that the instrument before us is not an attempted "assignment," which as an entirety is *void*, because made without the assent of the attaching creditor.

4. The verdict includes a finding that the mortgage was executed without any intent to hinder, delay, or defraud the attaching creditor, and there was evidence to sustain the finding.

5. The mortgage is accompanied by the affidavit and acknowledgment required by section 2957 of the Civil Code. It is urged, however, that the transaction was a legal fraud as

to the attaching creditor, because the note and mortgage were given for a larger sum than was due to the mortgagee.

When the mortgage was executed neither Alexander nor Goodall, Perkins & Co. had assented to the arrangement entered into by plaintiff and Heron, nor had they agreed to look to plaintiff for the payment of their claims against Heron. Before the attachment was levied, however, they had actually received from plaintiff the full amount previously due from Heron to each of them respectively.

The excess provided for in the mortgage, beyond debts due from Heron, the mortgagor, to plaintiff, was made up of debts due from the mortgagor to Alexander and to Goodall, Perkins & Co., which plaintiff, the mortgagee, promised to pay. Fairly construed, the contract between Heron and the plaintiff was that the instrument should constitute a lien for the sums due the plaintiff, and should become a lien for the additional sums due from Heron to Alexander and Goodall, Perkins & Co. when the plaintiff should pay the same, or with the assent of those persons relieve Heron of all obligation to pay them. It was a mortgage for a sum definite, and for advances of other definite sums to be made for the benefit of the mortgagor by being applied to the payment of certain of his debts. A mortgage of personal property, given for a greater sum than is due by the mortgagor to the mortgagee, to secure both a present indebtedness and future advances, is not fraudulent in law as to the creditors of the mortgagor because given for a greater sum than is due, even though the mortgage does not express upon its face that the excess is for future advances. And the question whether a mortgage, given for a greater sum than was due, was given in good faith, both for a present indebtedness and to secure future advances, is one of fact for the jury, under proper instructions from the court. (*Tully v. Harloe*, 35 Cal. 302.)

The mortgage, made in good faith, as found by the jury, was valid, when it was executed, as between the parties to it, and as against the creditor who subsequently attached. It follows that the lien, originally for the amount due to the plaintiff, was increased as the contract between the mortgagor and mortgagee was carried out by the payment of the several sums, by the mortgagee agreed to be paid, to certain creditors of the mort-

gagor. When the attachment was levied, the mortgage was a valid lien in the amount to secure which it purports to have been made, as the sums which (together with the sum due to the mortgagee when the instrument was executed) make up that amount had actually been paid.

Judgment and order affirmed.

Hearing in Bank denied.

[No. 8652. Department One.—May 19, 1885.]

SIMON SILVERBERG, RESPONDENT, v. PHENIX INSURANCE COMPANY, APPELLANT.

FIRE INSURANCE—WAIVER OF FORFEITURE.—In an action upon a policy of fire insurance, it appeared that soon after the occurrence of the fire the defendant being notified of the fact, directed the proofs to be made out, which was done, and subsequently required the plaintiff to present witnesses and vouchers. After these witnesses and vouchers had been examined at length, the defendant said the proofs were satisfactory, instructed the plaintiff to make out formal proofs of loss, and said that the money would be paid at the expiration of the sixty days allowed by the policy for the payment of the loss. Nothing more was said by defendant until the expiration of that period, when, in response to a demand by the plaintiff for the money, defendant said the policy had been avoided by a breach of its conditions, and refused to pay. The defendant had full knowledge of all the facts when, after the examination of the witnesses and vouchers it expressed its satisfaction with the proofs and promised to pay the money. *Held*, that these acts on the part of the defendant constituted a waiver of any forfeiture by the plaintiff resulting from a breach of the conditions of the policy.

ID.—AUTHORITY OF AGENT.—The agents of the defendant were authorized, there being no provision in the policy to the contrary, to modify or altogether waive a condition of the policy.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The condition of the policy with respect to the possession of the property was as follows: "If any change take place in title or possession (except in case of succession by reason of death of the assured) whether by legal process or judicial decree, or voluntary transfer or conveyance . . . this policy is void."

Exhibit D referred to in the opinion was in the following form:—

“PLAINTIFF’S EXHIBIT D.

“Western and Southern Department.

“T. R. BURCH, *General Agent*.

“160 La Salle St., Chicago.

“*Phenix Insurance Company of Brooklyn*.

“March 21st, 1879.

“BROWN, CRAIG & Co., Agents, Pacific Coast:—

“Notice having been received that the property of the Pinal Mill & M. Co., ins’d under Ph. Pol. No. 51,408, F. Hall Pol. No. 12,349, and Lycg. Pol. No. 16,537, has been levied upon, but that the same is still in possession of and under charge of the said company, it is hereby agreed that the said policies shall continue and be in full force and effect, anything in the printed conditions of the same to the contrary notwithstanding.

“BROWN, CRAIG & Co.,

“Gen’l Agents.”

The remaining facts are stated in the opinion of the court.

Clement, Osment & Clement, for Appellant, cited *Shuggart v. Lycoming Insurance Co.*, 55 Cal. 408; *Healey v. Imp. F. Ins. Co.*, 5 Nev. 274; *Trask v. Ins. Co.*, 29 Pa. St. 198; *Wharton v. Mo. Car. F. Co.*, 1 Mo. App. 582, 583; *Thompson v. Insurance Company*, 104 U. S. 252; *Security Insurance Co. v. Fay*, 22 Mich. 471, 473; *Claflin v. Commonwealth Insurance Co.*, 110 U. S. 94, 95; *Devens v. The Mechanics’ and Traders’ Insurance Co.*, 83 N. Y. 168, 173; *Jewett v. Home Insurance Company*, 29 Iowa, 562.

Robinson, Olney & Byrne, and *H. J. Tilden*, for Respondent.

The agents of the defendant had authority to waive the forfeiture. (*Shafer v. Phenix Ins. Co.*, 53 Wis. 361; *Insurance Co. v. Wilkinson*, 13 Wall. 222; *Pechner v. Phenix Ins. Co.*, 65 N. Y. 195; *Marvin v. Universal Insurance Co.*, 85 N. Y. 278; *Whited v. Germania Insurance Co.*, 76 N. Y. 415; *Insurance Company v. Norton*, 96 U. S. 234; *Phenix Ins. Co. v. Doster*, 106 U. S. 34; *Young v. Hartford Insurance Co.*, 45 Iowa, 378; *Wright v. Hartford Ins. Co.*, 36 Wis. 522; *Gans v. St. Paul, etc., Insurance Co.*, 43 Wis. 112; *American, etc., Ins. Co. v. McRae*, 8 Lea (Tenn.) 513; *Brandup v. St. Paul, etc., Insurance Co.*, 27 Minn. 393; *Richmond v. Niagara Fire Insurance Co.*, 79 N. Y. 230; *Phenix, etc., Insurance Co. v. Hinsley*, 75 Ind. 1; *Fire*

Insurance Co. v. Building Association, 43 N. J. L. 653; *Insurance Co. v. McLanathan*, 11 Kan. 583; *Westchester Fire Ins. Co. v. Earl*, 33 Mich. 143.) The defendant waived its right to insist upon any forfeiture. (*Phenix Ins. Co. v. Doster*, 106 U. S. 35; *Young v. Mutual Life Ins. Co.*, 2 Sawy. 330; *Titus v. Glenn Falls Ins. Co.*, 81 N. Y. 418; *Penn. Ins. Co. v. Kittle*, 39 Mich. 54; *Gans v. St. Paul, etc., Insurance Co.*, 43 Wis. 109; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422; *Williams v. Hartford Ins. Co.*, 54 Cal. 442; *Johnson v. Southern Mutual Life Ins. Co.*, 79 Ky. 403; *Levy v. Peabody Ins. Co.*, 10 W. Va. 560, 572, 583; *Farmers', etc., Ins. Co. v. Chestnut*, 50 Ill. 11; *Short v. Home Ins. Co.*, 90 N. Y. 16; *Haight v. Continental Ins. Co.*, 92 N. Y. 51; *Hill v. Hibernia Ins. Co.*, 10 Hun, 29; *Webster v. The Phenix Ins. Co.*, 36 Wis. 67; 17 Am. Rep. 479; *Insurance Co. v. Eggleston*, 96 U. S. 577.)

ROSS, J. — It is unnecessary to decide many of the questions argued by counsel, for we are of opinion that the forfeitures relied on by appellant were waived. The policy in question was issued to insure the quartz mill and machinery of the Pinal Mill and Mining Company, situated in the territory of Arizona, and the loss was made payable to one Loomis. The fire occurred on the 2d of April, 1879. Soon afterwards the defendant was notified of the fact. On the 17th of the same month Loomis gave an order on defendant to pay the loss to the plaintiff, which order was duly presented, and subsequently assigned the claim to plaintiff. Defendant directed the proofs to be made out, which was done, and subsequently required the plaintiff to present witnesses and vouchers. The witnesses, including the president and secretary of the company, were examined at length by defendant, as well as the vouchers, which consisted of the original receipted bills for materials, machinery, and labor in the construction of the mill. After all this the defendant said the proofs were satisfactory, instructed the plaintiff to make out formal proofs of loss, and said that the money would be paid at the expiration of the sixty days allowed by the policy for the payment of the loss. Nothing more was said by defendant until the expiration of that period, when in response to a demand by the plaintiff for the money defendant said the policy had been

avoided by breach of its conditions and refused to pay. The verdict includes a finding that defendant had full knowledge of all the facts when, after the examination of the witnesses and vouchers, it expressed its satisfaction with the proofs and promised to pay the money. The facts of the present case with respect to the question of waiver are much stronger against the insurance company than were the facts in the case of the *Penn. Ins. Co. v. Kittle*, 39 Mich. 54, where the court, through Cooley, J., said: "The question of waiver was submitted to the jury as one of fact, and they appear to have found that there was a waiver. The facts submitted were that, after the loss, the adjusting agent of the defendant called upon the plaintiff, and after investigation, made an offer to pay, by way of compromise, \$375, at the same time objecting to the taking out of the second insurance; that this offer was declined, and the agent went away, and soon after wrote the plaintiff that she might go on and make out her proofs, and the matter would then be taken into consideration; that subsequent correspondence took place between the agent and the plaintiff respecting the proofs, the former demanding more particularity in what was furnished, and it was not until six months after the offer for a settlement was made that the agent notified the plaintiff, who in the meantime had been endeavoring to make the proofs satisfactory, and to overcome the objections he was making thereto, that 'in addition to the objections heretofore made,' the defendant would insist upon the forfeiture because of the second insurance. We think the jury were warranted in finding that the defendant, by calling upon the plaintiff to go on and make out her proofs, and by requiring her to be at the trouble and expense of correcting these to satisfy the criticism made by the agent, without giving her to understand that the company would rely upon the forfeiture, should be held to have waived it; and that, if it was the purpose all the while to insist upon it, the agent did not act towards her in good faith." To the same effect many cases might be cited, but it is unnecessary to do so.

The case of *Shuggart v. Lycoming Fire Ins. Co.*, 55 Cal. 408, was put upon the ground that the policy contained an express provision that no agent was empowered to waive any of the conditions of the policy, either before or after loss, without express

authority in writing from the company. The policy in suit contained no such provision. In the absence of such a provision the observations of the Supreme Court of the United States, in the case of the *Insurance Co. v. Wilkinson*, 13 Wall. 222, are not inappropriate.

"It is well known," said the court, "so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured.

"The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argument being that, as to all other acts of the agent, he is the agent of the assured.

"This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the

victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* co-extensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment, as if they proceeded from the principal."

Under this rule, which we think the true one, the agents of the defendant were authorized — there being no provision in the policy to the contrary — to modify or altogether waive the condition of the policy with respect to the possession of the property, and there was no error in admitting in evidence Exhibit "D."

The jury was fairly instructed with respect to the law applicable to the facts.

Judgment and order affirmed.

McKEE, J., and MCKINSTRY, J., concurred.

[No. 7762. In Bank.—May 19, 1885.]

JAMES M. LEARNED ET AL., RESPONDENTS, v. C. C.
CASTLE ET AL., APPELLANTS.

EQUITY—GENERAL VERDICT—FINDINGS.—No judgment can be entered on a general verdict rendered by a jury in an equity case, and a judgment thus entered will be reversed for a failure of the court to find upon the issues.

ACTION TO ABATE A NUISANCE COMMENCED UNDER FORMER CONSTITUTION.—An action to prevent or abate a nuisance under the former Constitution of this State was a case in equity, and where such action was pending in one of the late District Courts at the time of the adoption of the Constitution of 1879, its character as a suit in equity is not changed.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order refusing a new trial.

The facts sufficiently appear in the opinion of the court.

J. B. Hall, J. H. Budd, J. C. Campbell, F. T. Baldwin, and A. P. Catlin, for Appellants.

Terry & Terry, and W. L. Dudley, for Respondents.

ROSS, J. — This action was commenced in one of the late District Courts, while the late Constitution was in force, to procure the abatement of alleged nuisances and the recovery of damages alleged to have been occasioned the plaintiff thereby. A demurrer interposed to the complaint was overruled by the District Court and subsequently the case was tried in the Superior Court.

If the action is one in equity, the general verdict rendered by the jury in the court below is not determinative of the issues made by the pleadings, and the judgment must be reversed for a failure of the court to find upon such issues. (*Warring v. Frecar*, 64 Cal. 54.) It was only because the action was a case in equity that the District Court had jurisdiction of it. The Constitution then in force gave the District Courts existing under it original jurisdiction "in all cases in equity," and to the County Courts existing under it, it gave original jurisdiction "of actions to prevent or abate a nuisance." It was held here in a number of cases that the District and County Courts had concurrent jurisdiction of such actions — the County Courts, by reason of the jurisdiction in terms conferred upon them by the Constitution, and the District Courts, because of the jurisdiction conferred upon them "in all cases in equity." (*Courtwright v. Bear River Mining Company*, 30 Cal. 576; *Yolo County v. Sacramento*, 36 Cal. 193.)

The case at bar being one in equity when commenced, and pending in the District Court, it would seem sufficiently clear that its character was not changed by the fact that the Constitution of 1879 abolished the District Courts and created Superior Courts. Under the provisions of that instrument the newly created Superior Courts succeeded to the business pending in the District Courts and actions then pending, except as in the Constitution otherwise provided, continued and remained unaffected by the adoption of the Constitution. (Article xxii.) There being nothing in the Constitution of 1879 manifesting an intent to change the character of actions pending at the time of its adoption in the District Courts, for the prevention or abatement of nuisances from cases in equity to actions at law, it

follows that such actions retained their former characteristic notwithstanding the change of Constitutions. This view renders it unnecessary to consider whether actions commenced in the Superior Courts for the prevention or abatement of nuisances under the provision which gives to such courts original jurisdiction "in all cases in equity," and . . . "of actions to prevent or abate a nuisance," are cases in equity or actions at law.

Judgment and order reversed and cause remanded for a new trial.

MORRISON, C. J., SHARPSTEIN, J., MCKINSTRY, J., MYRICK J., MCKEE, J., and THORNTON, J., concurred.

[No. 7760. In Bank.—May 19, 1885.]

FRANCIS J. BRANDON, APPELLANT, v. JAMES LEDDY
ET AL., RESPONDENTS.

DEED—UNCERTAINTY OF DESCRIPTION—PATENT AMBIGUITY—PAROL EVIDENCE.—A deed which shows upon its face that there are two lots to which the description equally applies is void for uncertainty, and parol evidence is inadmissible to explain the ambiguity.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The facts are stated in the opinion of the court.

John Reynolds, and *S. O. Houghton*, for Appellant.

J. Alexander Yoell, for Respondents.

The deed under which plaintiff claims was void for uncertainty in the description, and parol evidence is inadmissible to explain the ambiguity. (*Mesick v. Sunderland*, 6 Cal. 312; *Hammel v. Smith*, 15 Ohio, 134; *People v. Klumpke*, 41 Cal. 265; *Caldwell v. Center*, 30 Cal. 539.)

Ross, J. — On this appeal, which is from the judgment, the judgment roll alone is brought up. The action is ejectment, and both parties claim under one Carney, who, in 1848, was the

owner in fee of the premises in controversy. The defendants also claim under a tax deed, and rely further on the Statute of Limitations. In 1851 Carney executed to one Rosaria Bernal, under whom the plaintiff claims, a deed purporting to convey to her "one certain lot or parcel of land lying and being in the county of Santa Clara and State of California, and in the city of San Jose, and described as follows: It being twenty varas of lot seven and thirty varas of lot six, it being a part of block four, range eight, as shown by plot of said city of San Jose, being fifty varas square." This deed was put of record in Santa Clara County. Prior to 1848 the then Pueblo de San Jose, which is the present city of San Jose, was laid off into blocks and ranges and each block was surrounded by streets and was subdivided into lots, each lot being fifty varas square and each block containing at least eight lots. The blocks were numbered from one to four, commencing at San Fernando Street and numbering southwardly, said San Fernando Street being recognized and designated as the base line running easterly and westerly, each tier of blocks extending on both sides of the base line constituting a range, and the ranges being numbered from one to ten, commencing at the westerly side of the pueblo. Carney, at the time of his deed to Rosaria Bernal, was the owner of lots six and seven in block four, range eight, *north* of the base line, but he never was the owner of lots six or seven in block four, range eight, *south* of the base line. The first question to be determined is, whether or not the deed from Carney to Rosaria Bernal, conveyed thirty varas of lot six, block four, range eight, *north* of the base line; for if it did not do so, the defendants have the legal title to the premises by reason of a deed executed by Carney to Martha Glasson on the 29th of March, 1854, and mesne conveyances from Glasson.

The map referred to in the deed from Carney to Rosaria Bernal must be considered as incorporated in it. The deed therefore shows upon its face that there are two lots to which the description equally applies. From the deed itself it cannot be ascertained which lot was intended to be conveyed, and as the ambiguity is patent, resort cannot be had to parol. Our conclusion is that the deed in question is void for uncertainty of description, from which it results that the legal title to the lot

in dispute passed to Glasson in 1854, and subsequently, but before the commencement of this action, vested by mesne conveyances in the defendants.

Judgment affirmed.

MORRISON, C. J., MCKINSTRY, J., and THORNTON, J., concurred.

SHARPSTEIN, J., concurred in the judgment.

Rehearing denied.

[No. 8543. Department Two.—May 22, 1885.]

MICHAEL CONNIFF, RESPONDENT, v. THE CITY AND COUNTY OF SAN FRANCISCO, APPELLANT.

MUNICIPAL CORPORATION—GRADING STREET—TRESPASS—OBSTRUCTING WATER-COURSE—MONTGOMERY AVENUE IMPROVEMENT.—In grading Montgomery Avenue under the Act of April 3, 1876, the city and county of San Francisco had no authority to erect an embankment across a natural water-course in such a manner as to obstruct the natural flow of the waters therein, and cause them to run over and permanently remain on the land of an adjoining proprietor. Such conduct is a trespass amounting to the taking of the property of another. The former Constitution of California under which the work was done renders void all legislation purporting to authorize such a proceeding.

1D.—ACTION FOR INJURIES—STATUTE OF LIMITATIONS.—The Act of April 3, 1876, does not provide a mode of compensation for such damages, and consequently the party injured may maintain an ordinary action therefor against the municipality. Such an action is not barred until the expiration of three years from the time the cause of action accrued.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

J. F. Cowdery, and John L. Love, for Appellant.

The damages complained of are incidental to a public work duly authorized by statute, and are therefore *damnum absque injuria*. (*Moulton v. Parks*, 64 Cal. 166; *Green v. Swift*, 47 Cal. 536; *Jennings v. LeRoy*, 63 Cal. 397.) The municipal-

ity is not answerable for the acts or omissions of its officers. (Shearman & Redfield Negligence, § 138; *Alcorn v. Philadelphia*, 41 Pa. St. 348; *Winbigler v. Los Angeles*, 45 Cal. 36; *Crowell v. Sonoma Co.* 25 Cal. 313; *Howard v. San Francisco*, 51 Cal. 52.)

Wright & Cormac, and *John A. Wright*, for Respondent.

Public works must be executed with proper care and skill. If so executed, damages resulting therefrom are generally *damnum absque injuria*. But if carelessly or unskillfully executed and damages result to the citizen, his action always lies. (*Grim v. Swift*, 47 Cal. 540; Shearman & Redfield Negligence, §§ 131, 137, 144.) The action is for trespass upon real property and was not barred until three years. (Code Civ. Proc., § 338.)

THORNTON, J. — This action was brought to recover damages for injuries to plaintiff's lot and building caused by grading Montgomery Avenue, in the mode provided for grading streets in the general statute in regard thereto. It is averred in the complaint that in grading the street mentioned an embankment was formed fifteen feet above the plaintiff's property and the contiguous lots, by which the water that ran in a water-course crossing the street was permanently stopped in its flow and backed upon plaintiff's lot causing damage to it and the building thereon; that the street was thus made in accordance with the specifications furnished by the superintendent of streets, highways, and public squares, and under his direction and to his satisfaction; that this officer neglected and failed to have a culvert made in this embankment by which the water which flowed in the water-course mentioned would have been carried off, which neglect and failure constituted a want of skill and neglect on the part of the superintendent in the construction of the street.

It appears from the bill of exceptions that on the trial the plaintiff proved the following facts:—

“That the grading of Montgomery Avenue as alleged in the amended complaint, was completed on the 12th day of June, 1879. That prior thereto there was a channel within about 200 feet of plaintiff's premises, through which the drainage or surface

waters from the hills in the vicinity of said premises discharged into the bay. That when completed the grade of said avenue formed a solid embankment across said channel and obstructed the same, and prevented the water from flowing into the bay as formerly. That said embankment was and is about fifteen feet above plaintiff's premises. That immediately upon the completion of said grading, to wit, on the said 12th day of June, 1879, the drainage or surface water which had theretofore been discharged through said channel, flowed upon and flooded plaintiff's premises, and the said drainage or surface waters have ever since that time remained upon said premises. That at the time the said premises were so flooded the same were damaged."

If upon these facts and the inferences justly deducible from them by the triers — for the jury not only find facts, but are authorized to find all inferences of fact justly to be deduced from the facts found (*Shafter v. Evans*, 53 Cal. 32; *Sillem v. Thornton*, 3 El. & B. 873) — the law is with the plaintiff, then the verdict as regards any question arising on the facts is unimpeachable and the judgment must stand. Then, in considering these facts, we must also take into consideration all the inferences which the jury may justly have deduced from them.

Now the facts referred to show a channel within about 200 feet of plaintiff's premises through which the drainage or surface waters flowed into the bay; that this channel was obstructed by a solid embankment built across it about fifteen feet above the plaintiff's property, which prevented the waters from flowing into the bay as formerly; that the waters which flowed into this channel and were discharged by it, came from the hills in the vicinity of the plaintiff's premises; that on completion of the embankment mentioned, the waters which had been prior to that time discharged through the channel were detained on plaintiff's premises, flowed upon and flooded them, have ever since remained permanently upon them, and damaged them.

This improvement of Montgomery Avenue by grading it was executed under the Act of April 3, 1876. (See Stats. 1875-76, p. 753, and § 19 of this act.) This section provides for the awarding a contract for the work referred to by the board of supervisors of the city and county of San Francisco, on the

happening of an event designated in section 17 of the same act, and it is further provided in the same section that all the proceedings both before and after the awarding of the contract shall be the same as was at that time provided by law for the grading of streets in the said city and county.

The act then in force regulating the grading of streets was the Act of April 1, 1872 (see Stats. of 1871-72, pp. 804, 805, *et seq.*), in which the powers and duties of the superintendent of streets were defined and to some extent those of the contractor. Under the provisions of this act the contractor must have performed the work of grading to the satisfaction of the superintendent of streets, before he can procure an assessment to be made and a warrant issued for the compensation he is to receive. (§ 9, Act of 1872.) The work is to be performed under the charge, superintendence, and inspection of the superintendent. (§ 26 of same act.) The grading of streets of the city of San Francisco can only be done under an order of the board of supervisors.

The facts proved show that the embankment stopped the flow of the waters in the channel of usual escape, formed by the operation of natural causes, so that they were thrown back and detained on the lot of plaintiff, and caused the damage complained of. Can this be done? Conceding that a municipal corporation is not responsible for damage caused by the gathering of the surface waters, not running in a natural channel, produced by the raising of a street to the grade established by law, it does not follow that it would not be responsible herein. Here a natural channel is stopped, one which it may be properly inferred had existed for a long series of years, and the water thus dammed is forced to flow over a lot 200 feet distant from the channel. It is well settled that a municipal corporation has no right, in the absence of valid legislative authority, changing what would otherwise be the legal rights of the parties, to stop up a natural channel through which waters run by an embankment made in grading a street, under its general powers to grade and improve streets. (See *Baron v. Baltimore*, 2 Am. Jur. 203, cited, commented upon, and approved in *Stetson v. Faxon*, 19 Pick. 147; 31 Am. Dec. 123; *Gardner v. Neuburgh*, 2 Johns. Ch. 162; 7 Am. Dec. 526; *Phinizy v. Augusta*, 47 Ga. 260.)

An individual has no right to collect in artificial channels mere surface water, and precipitate it upon the land of another. Nor has a corporation, whether public or private, the right to collect in such channels mere surface water precipitated by rain or snow over large districts, and throw it upon the property of another. The cases to this effect are numerous, and may be found cited in a note to section 272 of Gould on Waters. We know of no principle of law which justifies either a corporation or individual in stopping up by an embankment or dam a natural channel by which surface waters escape, obstruct the natural flow of such waters, and cause them to run over and permanently remain on another's property. Such conduct would be a most flagrant trespass on the rights of another in the shape of a direct invasion of his land amounting to a taking of it within the rule laid down in *Pumpelly v. Green Bay Co.* 13 Wall. 166 occasioning inconvenience and damage to him and thus constituting a nuisance. The case last cited from 13th Wallace is a direct authority for this conclusion. The action in this case was against a private corporation — here against one that is public and municipal — but we are not aware that there is anything in the nature or essence of the corporation known as the city and county of San Francisco, though public and municipal in its character, or in the statutes relating to it, which justifies it, even in the prosecution of a public work authorized by statute, and for the public benefit, in taking the property of another. The former Constitution of California under which the work was done as well as the Constitution now in force renders null all legislation purporting to authorize such a proceeding.

We take occasion to cite with hearty approval the following remarks of the Supreme Court of the United States in the case just referred to, speaking by Miller, J.:—

“We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways for the public good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall

be called upon to construe other State Constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further." (See also Gould on Waters, § 243, notes.)

The case before us is not one of mere consequential damage which the land owner must protect himself against, and for which the law affords him no redress. It is a direct trespass on the property of plaintiff by the construction of a dam which a moment's reflection would have made clear to any one, must inevitably in the course of nature have resulted in the permanent overflowing the land of plaintiff when the rainy season came, and from which he could only free himself by cutting away a public highway, for which he might have been proceeded against both by a civil and criminal action.

The cases of *Moulton v. Parks*, 64 Cal. 166, and *Green v. Swift*, 47 Cal. 536, have no application here. Nor is the case before us one where the damage has resulted from an error of judgment in officers to whose judgment the mode of grading the street was submitted by law for determination. It is a direct invasion of property rights, which no error of judgment can excuse or justify. Rights of property are assured by the settled principles of law, and are not at the mercy of the fallible judgment of men. The citizen or officer is bound to know these rights. If he violates them he must take the consequences.

But it is said that the statute of April 3, 1876, above cited, provided for a compensation for the injury complained of to the plaintiff, and where that is the case an action like this cannot be maintained.

Conceding the legal consequence above stated to be correct,

the question remains to be determined whether the act in question provides for compensation for the damage suffered by plaintiff. We are referred to the fifth section of the act by the counsel for defendant. The section is in these words:—

“The county clerk of the city and county of San Francisco, within forty days after the passage of this act, shall publish for thirty days, in the official newspaper of said city and county, a notice simply stating that by an act of the legislature, approved on the——day of——, eighteen hundred and seventy-six (giving the date of approval of this act), the grades of certain portions of Montgomery Avenue and of certain portions of certain streets intersecting Montgomery Avenue, in the city and county of San Francisco, have been changed, and referring to this act for further particulars, and requiring every person claiming damages by reason of said changes, within thirty days after the first publication of said notice, to file with the county clerk a verified statement, setting forth the description and situation of the claimant's property, its market value, and the amount of damages, over and above all benefits, which the claimant will sustain, and that upon the failure of any person to file such statement within the prescribed time, his or her claim or right to damages shall be forever forfeited.”

Every person claiming damages by reason of the changes of grade of the street (Montgomery Avenue) was required by the above section to file his claim for such damages within the time specified with the county clerk, to be presented to commissioners who were to pass on and determine the same, and when so determined provision was made by the act for their payment. (See §§ 5, 6, 7, 8, etc.) The act was passed for the purpose of changing the grade of the street, and to provide for the grading and regrading of portions of it. (See title of act.) We have no doubt that the damages referred to for which claims were to be filed were such as might arise from the actual grading of the street, by raising the surface thereof, by the deposit of earthy material on it to the established grade, or by lowering it by taking off earthy material to such grade. But certainly this had reference to the employment of the powers of the defendant corporation in grading in a lawful manner. It had no reference to the employment of such powers to the extent of

embanking and damming a natural channel for the escape of waters, through which waters had flowed for many years, so that the waters thus obstructed would flow back on the property of another, and there remain permanently covering such property and creating a nuisance. The property owner could not anticipate any such injury. Certainly the plaintiff here could not anticipate that such channel would be stopped up and obstructed, so that a quantity of water would accumulate in a permanent pool or pond in sufficient quantity to overflow his lot distant about 200 feet from the channel. This was a consequence which could not be foreseen or counted on. Nor would the commissioners to determine the damages under the act have allowed any claim for such damage. They would at once have seen that any such claim would be for damage not legitimately the result of grading the street, not following from the lawful exercise of powers vested in the municipality, but for a trespass which the city and its officers were restrained by law from committing. The law imposed on them no such duty, and the claim in the proper and discreet exercise of their powers must have been disallowed for the reasons above given. Neither the property owners nor the commissioners had before them the specifications of the work to be performed, for they had not then been framed. Under the act such specifications were not to be framed until some time afterwards. (See §§ 17, 19, of the Act of 1876.) For the reasons above given they could not anticipate nor even conjecture that such specifications would call for an embankment damming the waters of a natural channel through which they had flowed for an indefinite period, to the injury of others, by causing the waters to flow back upon other property and permanently cover it.

We are of opinion that such unforeseen and unanticipated damages consequent on the plan of grading adopted, not the result of grading the streets in a lawful mode to the modified levels, but the result of the mode of performing the work in a manner not authorized by law, were not contemplated or referred to in the statute, and therefore, that no mode of compensation was provided for in the act for the character of damages complained of and suffered in this cause. (See on this, Gould on Waters, § 378, notes.) The contention of appellant on this point cannot be upheld.

The defendant requested the court to direct the jury as follows: "This action was commenced the 2d day of December, 1881. If the jury believe from the evidence that the damage to plaintiff's property occurred more than two years before the commencement of the action, he cannot recover."

This request was refused and an exception was reserved.

In no view that we can take of the proposition presented by the request can we perceive that the court erred in refusing it. Under no circumstances did the action accrue for anything on the facts found until the 12th day of June, 1879, and the plaintiff had three years from that date to bring his action. The act complained of was a trespass on real property, and the action for damages caused by it was not barred for three years from its accrual. (See § 338, Code Civ. Proc.)

As the case presents a continuing nuisance, we are inclined to think that like any other trespass on real property, a new cause of action arises each day during which it continues. (*Bonner v. Welborn*, 7 Ga. 327; *Phinizy v. City Council of Augusta*, 47 Ga. 266.) But it is unnecessary here to so hold, and we therefore refrain from placing the decision on such ground.

We find no error in the record and the judgment is affirmed.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 8742. Department Two.—May 22, 1885.]

SAVINGS AND LOAN SOCIETY, RESPONDENT, v. SUSAN E. THORNE ET AL., APPELLANTS.

FINDINGS—JUDGMENT ENTERED WITHOUT.—In an action tried by the court without a jury findings, unless waived, are necessary, and a judgment entered in the absence of findings will be set aside.

ID.—WAIVER—NOTICE OF NEW TRIAL.—Findings are not waived by giving a notice of motion for a new trial.

APPEAL from an order of the Superior Court of the city and county of San Francisco, setting aside a judgment.

Action of ejectment. The facts are stated in the opinion of the court.

Bennett & Wigginton, for Appellants.

A. N. Drown, for Respondent.

The lack of findings was fatal to the judgment. (Code Civ. Proc. §§ 632, 633; *Billings v. Everett*, 52 Cal. 663; *Dowd v. Clarke*, 51 Cal. 262; *Bond v. Pacheco*, 30 Cal. 534; *Freeman on Judgments*, §§ 129, 533.)

The COURT. — In this case a jury was waived, and trial had by the court. Findings were not filed or waived, and a judgment was entered in favor of the defendants. After the lapse of more than six months, plaintiff moved to have the judgment vacated on the ground above indicated. The motion was granted, and from the order granting it this appeal was taken. In *Dowd v. Clarke*, 51 Cal. 262, this court said: "There are no 'findings of fact' in this transcript, nor does it appear that such findings were waived in the court below, *in any of the three modes* provided for in section 634 of the Code of Civil Procedure. Unless waived a judgment cannot be permitted to stand in the absence of the findings of fact."

Before giving notice of his motion to have the judgment vacated the plaintiff gave notice that he would move for a new trial, and afterwards gave notice of his abandonment of that motion. Appellants insist that by giving notice of motion for a new trial plaintiff waived findings. The statute, however, enumerates the modes by which findings may be waived and that is not one of them. The modes enumerated must be held to be exclusive. This case is not within the purview of section 473 of the Code of Civil Procedure.

Order affirmed.

[No. 20043. In Bank.—May 22, 1885.]

THE PEOPLE, RESPONDENT, v. PATRICK TIERNEY,
APPELLANT.

CRIMINAL LAW—RAPE—EVIDENCE—PARTICULARS OF COMPLAINT.—On a trial for rape, the prosecutrix cannot give evidence of the particulars of a complaint made by her shortly after the assault.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order refusing a new trial.

The defendant was convicted of the crime of rape. The further facts are stated in the opinion of the court.

Cross & Simonds, for Appellant.

Attorney-General Marshall, for Respondent.

THE COURT. — On the trial of the defendant, who was charged with the crime of rape, the prosecutrix was permitted, against the objection and exception of the defendant, to give in evidence the particulars of the complaint which she testified she made to Mrs. Kieley shortly after the occurrence. This was held erroneous by this court in the recent case of *People v. Mayes*, 66 Cal. 597. On the authority of that case the judgment and order are reversed and the cause remanded for a new trial.

MYRICK, J., dissented.

[No. 20069. In Bank.—May 22, 1885.]

THE PEOPLE, RESPONDENT, v. JOHN MCGILVER,
APPELLANT.

BURGLARY—EVIDENCE OF OWNERSHIP OF HOUSE—VARIANCE.—An information for burglary alleged that the crime was committed by entering the house of H. Wempe. A witness named G. Wempe testified that his father owned the house. No evidence of the owner's Christian name was given. *Held*, that the jury might presume that the name of the father of the witness was Wempe, and that he was in possession of the building; and that there was no variance between the information and the evidence.

ID.—EVIDENCE OF SUBSEQUENT OFFENSE.—On the trial of such offense evidence was given that at the time of the defendant's arrest he and an accomplice were attempting to commit another burglary, that burglars tools were found in the possession of the latter, and that articles stolen at the first robbery were found on the person of each. *Held*, that the evidence was admissible as tending to connect the parties with the first robbery.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The defendant was convicted of the crime of burglary in the first degree. The further facts are stated in the opinion of the court.

John D. Whaley, for Appellant.

Attorney-General Marshall, for Respondent.

MYRICK, J. — The appellant McGilver was accused jointly with one Mark M. Lay of the crime of burglary, committed by entering the house of H. Wempe on the 14th of June, 1884, with intent to commit larceny. The appellant was separately tried.

On the trial one G. Wempe gave evidence concerning the ownership of the house. He stated: "My father owns the house." "It is my father's and mother's; my father owns the house;" "the deed runs to my father and mother; my father and mother both own the lot, and my father and mother built the house; my father and mother own the house." No evidence was given as to the first name (or initial thereof) of the owner; the owner was spoken of in the testimony as Mr. Wempe. The point is made on this appeal that the owner's name should have been proved as laid, and that the omission to prove that H. Wempe was the owner is fatal. It was competent for the jury to presume from the evidence of G. Wempe that his father's name was Wempe, and that he was in possession of the building, for the purposes of the prosecution; it does not appear that the elder Wempe's name was not H. Wempe, as laid; therefore a variance does not appear. (§§ 956, 1404, Pen. Code; *State v. Black*, 31 Tex. 560.)

It is claimed that the court erred in admitting evidence that McGilver and Lay, at the time of their arrest, were attempting to break into a jewelry store, a day or two after the burglary in question, and that the officers found burglars' tools in Lay's possession. In addition to the burglars' tools, the officers found on the person of each of the arrested parties articles which were identified as having been taken from Wempe's house. We see no error. The evidence tended to connect the parties with the Wempe burglary, and for that reason was admissible.

Judgment and order affirmed.

MORRISON, C. J., SHARPSTEIN, J., MCKINSTRY, J., ROSS, J., and MCKEE, J., concurred.

[No. 7656. In Bank.—May 22, 1885.]

M. MEHERIN, RESPONDENT, v. W. J. OAKS, APPELLANT.

CHATTEL MORTGAGE—RECORDING.—A chattel mortgage, accompanied by the affidavit of all the parties thereto, as required by section 2957 of the Civil Code, is deemed to be recorded within the meaning of that section, when being duly acknowledged or proved, and certified, it is deposited in the recorder's office with the proper officer for record.

APPEAL from a judgment of the Superior Court of San Luis Obispo County.

The facts are stated in the opinion of the court.

W. H. Spencer, John Scott, McD. R. Venable, and Oliver P. Evans, for Appellant, cited *Chamberlain v. Bell*, 7 Cal. 294; *Page v. Rogers*, 31 Cal. 320, 321; *Donald v. Beals*, 57 Cal. 402.

J. M. Wilcorson, W. J. & E. Graves, and Mich. Mullany, for Respondent, cited *Jones on Mortgages* (3d ed.), § 552; *Wood's Appeal*, 82 Pa. St. 116; *Payne v. Pavey*, 29 La. An. 116; *Merrick v. Wallace*, 19 Ill. 486, 497; *Polk v. Cosgrove*, 4 Biss. 437; *Riggs v. Boylan*, 4 Biss. 445; *Mims v. Mims*, 35 Ala. 23; *Dubose v. Young*, 10 Ala. 365; *Tousley v. Tousley*, 5 Ohio St. 78; *Sinclair v. Slawson*, 44 Mich. 123; *Brook's Appeal*, 64 Pa. St. 127; *Musser v. Hyde*, 2 Watts & S. 314; *Jones on Chattel Mortgages*, § 270.

MYRICK, J.—The question involved in this appeal arises under section 2957 of the Civil Code, which reads as follows:—

“A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and encumbrances of the property in good faith and for value, unless:—

“1. It is accompanied by the affidavit of all the parties thereto, that it is made in good faith, and without any design to hinder, delay, or defraud creditors.

“2. It is acknowledged or proved, certified and recorded, in like manner as grants of real property.”

The chattel mortgage was properly executed by Jones, and Jones to Meherin, and was accompanied by the affidavit required by law of all the parties, and was deposited with the recorder to be by him recorded. The recorder in compliance with

section 4242 of the Political Code, indorsed on the instrument the time when and the book and pages in which it was recorded. In recording the instrument the recorder omitted to record the words "and M. Meherin the mortgagee" contained in the affidavit, so that, as the record made the instrument appear the affidavit was signed by Meherin, but he did not join in the verification. The recorder also omitted to record the words "notary public" after the name of the officer taking the acknowledgment of one of the mortgagors, and omitted to indicate that the seal of the notary was annexed to the certificate, although the instrument itself was complete in both particulars.

The defendant, as sheriff, seized the property by virtue of an execution in favor of one Preston against Jones, mortgagor, and the day following such seizure plaintiff gave notice to the defendant of the mortgage, and of its place of record. The defendant disregarded the notice and sold the property.

The appellant insists that he was entitled to stand on the notice imparted to him by the record, and that, as the record did not show a valid mortgage, the fact that the mortgage itself was complete did not give plaintiff a lien; that the instrument was not a mortgage until recorded; and that it was incumbent on the mortgagee to see to it not only that the instrument was properly executed, but that it was properly recorded.

Considering the section above quoted, 2957, by itself, there would be much ground for the position taken. But the section says, the instrument must be recorded in like manner as grants of real property. Referring to the Civil Code, concerning the recording of transfers of real property, we find in section 1158 that any instrument affecting the title or possession of real property may be recorded under chapter 4, and in section 1170 that "an instrument is deemed to be recorded when, being duly acknowledged or proved, and certified, it is deposited in the recorder's office with the proper officer for record."

The mortgage, properly executed, having been deposited in the recorder's office with the proper officer for record, the mortgagee had done all that the law required of him to do; the defendant had actual as well as constructive notice that the plaintiff made some claim to the property, and he should have inquired whether or not the record spoke the truth.

As the defendant made no offer to pay, tender, or deposit the amount due on plaintiff's mortgage under sections 2968 and 2969 of the Civil Code, he was not justified in the seizure. (*Wood v. Franks*, 56 Cal. 218.)

We think the findings substantially cover the issues.

Judgment affirmed.

MORRISON, C. J., SHARPSTEIN, J., and MCKEE, J., concurred.

McKINSTRY, J., and ROSS, J., dissented.

[No. 9756. Department One.—May 22, 1885.]

CALIFORNIA SOUTHERN RAILROAD COMPANY, RESPONDENT, v. THE SOUTHERN PACIFIC RAILROAD COMPANY ET AL., APPELLANTS.

EMINENT DOMAIN—RAILROADS—RIGHT OF WAY—JOINDER OF PROCEEDINGS.—Under section 1244 of the Code of Civil Procedure a proceeding by a railroad corporation to acquire a right of way across the right of way of another railroad company, and a proceeding to acquire a right of way over lands which the defendant owns in fee, may be united.

ID.—PLEADING—ALLEGATION OF TERMINI OF ROUTE.—The complaint, after stating the general route of the proposed road, alleged that the termini were to be National City and "a connection with the Atlantic and Pacific Railroad Company at or near the thirty-fourth parallel of north latitude in the State of California." *Held*, that the termini were alleged with sufficient certainty.

ID.—CONSOLIDATION OF RAILROADS—ARTICLES OF INCORPORATION.—Under section 473 of the Civil Code, and section 40 of the Act of 1861, upon the consolidation of two railroad corporations, the articles of consolidation constitute new articles of incorporation, and should be filed in the office of the secretary of State.

ID.—IMPROVEMENTS—WHEN NOT INCLUDED IN COMPENSATION.—The value of improvements erected by the plaintiff on the land sought to be condemned, with the consent of the defendant, must not be considered in determining the compensation to be awarded for the land.

ID.—MANNER OF CROSSING—QUESTION FOR JURY.—The question whether the manner of crossing is compatible with the greatest public benefit and least private injury, is one of fact to be determined with reference to the circumstances of the case.

ID.—VERDICT—NEW TRIAL—JURY.—So far as the value of the property to be taken is concerned, the verdict of the jury is conclusive, although perhaps a new trial may be allowed by the court. All other issues of fact may be submitted to the jury.

- Id.—JUDGMENT—SIGNATURE BY JUDGE—ENTRY.—The judgment need not be signed by the judge. The presumption is that the judgment as entered by the clerk was authorized.
- Id.—FINAL JUDGMENT—FINAL ORDER OF CONDEMNATION—APPEAL.—In such proceedings the judgment on the assessment of damages, and adjudicating that the use is public, the taking necessary, etc., is the final judgment; the final order of condemnation is a special order made after final judgment, and an appeal therefrom must be taken within sixty days after its entry.
- Id.—COMPLAINT—VALUE OF PROPERTY.—The complaint need not allege the value of the property sought to be condemned.
- Id.—COST OF FENCES—WHEN NOT AN ELEMENT OF DAMAGE.—In the absence of circumstances making the cost of fences an element of damage, the provisions of the statute imposing on a railroad company the duty of fencing its road or to pay for fencing, do not affect the question as to the compensation to be paid for taking the land or imposing an easement upon it.

APPEAL from a judgment of the Superior Court of San Bernardino County from a final order of condemnation, and from an order refusing a new trial.

Proceeding brought by one steam railroad company against another for the purpose of acquiring a right of way through lands of the defendant. The further facts are stated in the opinion of the court.

A. B. Hotchkiss, for Appellants.

Byron Waters, and *M. A. Luce*, for Respondent.

The COURT.—1. It is contended by appellants that the court below ought to have sustained the demurrer to plaintiff's complaint, taken on the ground of a misjoinder of causes of action; that a proceeding to ascertain compensation for crossing one railroad by another cannot be united with a proceeding to acquire lands for depot buildings. It is urged that the defendant, the Southern Pacific, has only an easement, that such easement is not an estate in lands, and that section 1244 of the Code of Civil Procedure only permits *all parcels of land* required for the same public use to be included in the same proceeding. But here the proceeding is to acquire a right of way across the right of way of the defendant railroad company (which the statutes allow), and to acquire a right of way over lands of the defendant. In such case an easement is sought to be acquired, as it provided for in the Code of Civil Procedure (§ 1239). If the easement is not technically an estate in the land, the acquisition

of the right of way involves the taking of a parcel of land, within the meaning of the statute. It has never been doubted that proceedings to condemn two or more parcels for the purpose of the right of way may be united under section 1244, although the result may not be to transfer the fee, or any estate in the lands, but only to impress them with an easement.

2. It is claimed that the complaint is demurrable because it does not appear therefrom that the parties have disagreed as to the value of the property sought to be condemned for the public use. But the fact of disagreement is averred in terms. The complaint also alleges that the two corporations could not agree as to the points or manner of crossing, intersection, and connection.

3. The complaint *does* contain a statement of all owners and claimants of the property as required by the statute.

4. Appellants claim that the complaint does not show the location, general route, and termini of the proposed road as required by section 1244 of the Code of Civil Procedure. The "general route" is given and the termini are stated to be National City and "a connection with the Atlantic and Pacific Railroad Company at or near the thirty-fifth parallel of north latitude in the State of California." In *Callender v. Painsville Co.* 11 Ohio St. 516, it was held that a statement of the termini and line of a road in a certificate of incorporation is sufficient if such as would have been sufficient in a special act of incorporation. An allegation in the complaint as to termini is sufficient if it follow the language contained in a valid certificate of incorporation.

5. The cross-complaint was properly stricken out. (*Cal. P. R. R. Co. v. Central P. R. R. Co.* 47 Cal. 549; *Moyle v. Porter*, 51 Cal. 639.)

6. Appellants contend the plaintiff failed to prove that, after the consolidation or amalgamation of the California Southern Railroad Company and the California Southern Extension Railroad Company, a copy of "the new articles of incorporation" was filed in the office of the secretary of State. But a careful reading of section 40 of the Law of 1861 (Hittell's Dig. par. 865.), and of section 473 of the Civil Code, shows that by the latter, as by the former, it was intended that the articles of consolidation — themselves constituting the new articles of in-

corporation — should be filed. And since the articles of consolidation constitute the new articles of incorporation, the persons named therein to act as directors until their successors shall be elected in the manner to be provided in the by-laws were properly named as directors.

7. There was evidence of consent by defendants to the entry and building of its road by plaintiff on sections of land 7, 19, 21, and 33, and that the entry of plaintiff and its acts thereon were not trespasses. The value of the ties, rails, etc., were therefore not to be considered as part of the realty in determining the compensation to be awarded for the lands taken. (*Cal. S. P. R. Co. v. Armstrong*, 46 Cal. 90.)

8. We think the question as to whether the manner of crossing (on a level, above or below the other road) is compatible "with the greatest public benefit and least private injury," is a question of *fact*, to be determined with reference to the circumstances proved in each case.

9. There was evidence to sustain the findings that the plaintiff and the defendant, the Southern Pacific Railroad Company, could not agree on the points and manner of the crossing, and could not agree upon the compensation to be made therefor.

10. The title of the Code of Civil Procedure which treats of eminent domain does not in express terms provide for a judgment in condemnation proceedings, unless the "final order of condemnation" mentioned in section 1253 can be called the judgment. Yet, by section 1256, "except as otherwise provided in this title, the provisions of part 2 of the Code are applicable," etc. And section 1241 requires of the court to determine that the taking of particular property is necessary to a use which is public, and the value of such property. So far as the assessment of the value of the property to be taken is concerned (while perhaps a new trial of the question of value may be allowed by the court) the verdict of the jury is conclusive. (Constitution, art. i. § 14.) As to other issues of fact made by the pleadings the court is authorized by the Code of Civil Procedure to submit them to a jury. (§ 309.)

The "judgment" recites the findings of the jury, and the same are thus adopted by the court, even if it should be conceded that the findings of the jury were merely advisory. It is urged

by appellants that the judgment or decree is not *signed* by the judge, but our attention has not been called to any provision of the Codes which requires any judgment to be signed by the judge. The presumption would be that the judgment entered by the clerk was directed and authorized by the judge. In the present case the presumption is strengthened by the fact that the court subsequently made an order (which is signed by the judge), of "final condemnation," based on a compliance with the judgment, on the part of plaintiff, by the payment of certain moneys therein determined to be the value of the property to be taken, etc.

11. The judgment based in part on the assessment of damages, and adjudicating that the use is public, and the taking necessary, etc., is the "final judgment" from which an appeal may be taken. The sum of money assessed must be paid within thirty days after "final judgment." (Code Civ. Proc. § 1251.) It may, as suggested, be an inaccurate use of terms to designate as *final* a judgment, which the court may set aside (with all the proceedings on which it is based) if the sum of money assessed is not paid. (Code Civ. Proc. § 1252.) And ordinarily a judgment is not final when the law contemplates further and subsequent proceedings in the same court to precede the absolute determination of the rights of the parties. But the question is not what is or is not a final judgment, within the appropriate meaning of the terms, but what is intended to be designated as the final judgment in the title treating of eminent domain. Reading the sections bearing on the matter together the final judgment is not the final order of condemnation provided for in section 1253, but is and must be the judgment which adjudges the sum to be paid within thirty days after it is entered. (§ 1251.)

12. It follows that the "final order of condemnation" must be considered a "special order made after final judgment," from which an appeal must be taken within sixty days after its entry.

From the transcript before us it appears the "final order of condemnation" was entered August 6, 1883, and the notice of appeal therefrom was not filed nor served until August 2, 1884. The appeal from the order must be dismissed.

13. Appellants further contend that the decision is against law, in that the value of the property was found by the jury to

be less than the value alleged in the complaint. But when the value cannot be agreed upon it is for a jury (unless waived) to determine the value. The plaintiff is not required to state the value in the complaint. (Code Civ. Proc. § 1244.) The allegation of the complaint as to value is an immaterial and impertinent allegation, which the plaintiff was not required to prove.

14. Appellants claim the judgment appealed from is invalid because of that portion of it which permits the plaintiff, in lieu of paying the value of certain fences to be erected by defendants, to give bond that it will build the fences itself. The claim is that, under the Constitution (art. i. § 14), compensation must be made in money before appropriation. If the estimated cost of fencing found by the jury in compliance with the fourth subdivision of section 1248 of the Code of Civil Procedure is a portion of the *compensation* to be paid for the private property appropriated to the public use, the objection is well taken.

In *Butte County v. Boydston*, 64 Cal. 110, it was held, in a proceeding to condemn a right of way for a public road, that when it appears that the value of the adjoining land will be reduced by running the road through a fenced tract, evidence was admissible to prove the cost of fencing along the road. And here, if it appeared that a necessity for fencing would arise to restore the adjoining land to its value prior to the taking of the right of way, the cost of such fencing might be considered as an element of damage. But the record herein does not show that the circumstances existed which would make the cost of fencing an element of damage, and as was pointed out in *Butte County v. Boydston*, the provisions of the statute which impose on a railroad company the duty of fencing its road, or to pay for fencing, do not affect the question as to the compensation to be paid for taking the land or imposing an easement upon it.

15. If it be conceded that the question, asked of the witness Perris, "is that location and crossing made in a manner most compatible with the greatest public benefit and least private injury," was objectionable as "calling for conclusions," etc., the ruling of the court permitting the question could not have injured the defendants, since the answer of the witness consisted of a statement of facts submitted to the court and jury, as tending to prove that the location and crossing were made in such man-

ner as subserved the greatest public benefit and least private injury.

16. The answer denies that the plaintiff is a corporation, and there is no finding upon the issue thus made. Yet as upon the evidence the court must have found the plaintiff to be a corporation, the omission is not material.

The appeal from the final order of condemnation is dismissed. Judgment and order denying a new trial affirmed.

Hearing in Bank denied.

[No. 9841. Department One.—May 25, 1885.]

O. B. POWERS, PETITIONER, *v.* A. M. CRANE, JUDGE, ETC.,
RESPONDENT.

APPEAL—JUDGMENT OF FORECLOSURE—CHATTEL MORTGAGE—UNDERTAKING TO STAY EXECUTION.—The statutory undertaking of \$300 given on an appeal from a judgment for the foreclosure of a chattel mortgage operates as a stay of execution, and if a further undertaking be given to stay execution, it cannot be enforced against the sureties therein for want of consideration.

APPLICATION for a writ of mandate to the judge of the Superior Court of Alameda County.

On December 21, 1880, the petitioner obtained a judgment against J. A. Johnson and J. B. Wyman for the foreclosure of a chattel mortgage and a sale of the mortgaged property. From this judgment and an order denying a new trial an appeal was taken. To perfect the appeal an undertaking in the sum of \$300, conditioned to pay the costs and damages on appeal, was executed, and also an undertaking in the sum of \$6,661.36 to stay proceedings on the judgment. After an affirmance of the judgment and order on appeal the mortgaged property was sold, and a judgment docketed for the deficiency. The further facts are stated in the opinion of the court.

Edward Lynch, for Petitioner.

B. McFadden, and *Flournoy, Mhoon & Flournoy*, for Respondent.

LXVII. CAL.—5

ROSS, J. — The petitioner's counsel states that if the undertaking given to stay execution in the action entitled *Johnson v. Powers* was not binding upon the sureties thereon, it would be idle to compel the respondent by mandamus to act upon the petitioner's motion. In this respect we agree with petitioner, and therefore inquire whether the undertaking is binding upon the sureties. *Johnson v. Powers* was an action in which by cross complaint, the defendant therein sought the foreclosure of a chattel mortgage. The court by its decree ascertained the amount due from the plaintiff to the defendant, and ordered a sale of the mortgaged property to pay the amount, with the usual provision in regard to the payment of costs, commissions, etc., and directing that in the event the proceeds of the sale be insufficient to pay the mortgage debt, that a judgment be docketed against the plaintiff in defendant's favor for such deficiency. From that judgment the plaintiff appealed, and for the purpose of staying execution of the judgment, gave in addition to the statutory undertaking of \$300, an undertaking in double the amount of the sum ascertained by the decree to be due from the plaintiff to the defendant. On appeal the judgment was affirmed and upon the going down of the *remittitur* the defendant's costs of appeal were paid to him and an order of sale issued under which the property was sold, and having realized but a trifle of the amount of the mortgaged debt, the defendant, who is the petitioner here, sought by motion in the court below to have judgment entered against the sureties on the undertaking for the amount of the deficiency. On behalf of the sureties who are the real parties in interest here, it is claimed that the undertaking, except in so far as the \$300 is concerned and about which no question arises, was without consideration and void. The pretended consideration therefor was a stay of execution of the decree appealed from. And if the law itself operated a stay upon the giving of the \$300 bond it would seem that the point is well taken. That the statute did so operate was held by this court in the case of *Snow v. Holmes*, 64 Cal. 232. As the statute itself wrought the stay, there was no consideration for the sureties' promise. The benefit which the plaintiff in the case of *Johnson v. Powers* secured from the appeal came from the statute and not from the promise of the sureties.

Hence, what is said in *Hathaway v. Davis*, 33 Cal. 169, is not applicable.

Writ denied.

McKINSTRY, J., and McKEE, J., concurred.

Hearing in Bank denied.

[No. 8333. Department One.—May 25, 1885.]

THE SOUTHERN PACIFIC RAILROAD COMPANY OF
CALIFORNIA, RESPONDENT, v. DANIEL McCUSKER ET
AL. THOMAS WALKER, APPELLANT.

GRANT BY CONGRESS—PATENT—SWAMP LAND—ACTION TO QUIET TITLE.

—In an action to quiet title based upon a patent purporting to have been issued in pursuance of the grant by Congress to the Southern Railroad Company, the defendant may show that the land included in the patent was swamp and overflowed land, and therefore excepted from the congressional grant.

APPEAL from a judgment of the Superior Court of Monterey County, and from an order refusing a new trial.

The action was brought to quiet title to certain lands. The plaintiff claimed title under a United States patent issued to it in 1875, in pursuance of the Act of Congress of July 27, 1866, and resolution of June 28, 1870. The defendants claimed under a patent from the State of California for swamp and overflowed lands, dated and issued in 1868. The land in controversy was and always had been swamp and overflowed land, within the meaning of the Act of Congress of September 28, 1850.

A. S. Kittridge, for Appellant.

The land in controversy, being swamp and overflowed, was exempt from the operation of plaintiff's patent. The government officials had no authority to convey the same, consequently as to such lands the patent was void and open to collateral attack. (*St. Louis S. & R. Co. v. Kemp*, 104 U. S. 636; *McLaughlin v. Powell*, 50 Cal. 64; *Carr v. Quigley*, 57 Cal. 394; *McLaughlin v. Heid*, 63 Cal. 208; *Kile v. Tubbs*, 23 Cal. 441; *Sutton v. Fassett*, 51 Cal. 12.) The Act of Congress of Septem-

ber 28, 1850, was a present grant of all swamp and overflowed land within the States to the State, and thereby conveyed to it the whole beneficial estate in them to the exclusion of the United States. (*People v. Morrill*, 26 Cal. 336; *Kernan v. Griffith*, 27 Cal. 87; *Robinson v. Forrest*, 29 Cal. 317; *Pratt v. Crane*, 58 Cal. 533; *Kile v. Tubbs*, 59 Cal. 191.)

Wright & Cormac, and *John A. Wright*, for Respondent.

The patent to plaintiff could not be collaterally impeached by evidence that the land was swamp and overflowed. (*French v. Fyan*, 93 U. S. 171; *Polk's Lessees v. Wendall*, 9 Cranch, 98; *Cooper v. Roberts*, 18 How. 176; *U. S. v. Stone*, 2 Wall. 525; *Gibson v. Chouteau*, 13 Wall. 92; *Johnson v. Towsley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 533; *Foster v. Mora*, 98 U. S. 425; *Yount v. Howell*, 14 Cal. 466; *Doll v. Meador*, 16 Cal. 295; *Leese v. Clark*, 18 Cal. 573.)

Ross, J. — If in an action of ejectment based on a patent purporting to have been issued in pursuance of the grant by Congress to the railroad company, it is competent for the defendant to attack the validity of the patent on the ground that the land embraced in it was included within the exterior limits of a tract of land claimed as a Mexican grant, and therefore excepted from the congressional grant, as was held by a majority of this court in *McLaughlin v. Heid*, 63 Cal. 208, it is competent in an action to quiet title based on a similar patent for the defendant to show that the land included in it was swamp and overflowed land, and therefore excepted from the congressional grant. In the case at bar it was admitted by the respective parties that over one half of each governmental subdivision of the land in controversy was and always has been swamp and overflowed land, and thereby rendered unfit for cultivation. The case of *McLaughlin v. Heid* is binding on us, and on the authority of that case we must reverse the judgment and order of the court below.

Judgment and order reversed and cause remanded for a new trial.

MCKINSTRY, J., concurred in the judgment.

McKEE, J., concurred.

[No. 9998. In Bank.—May 25, 1885.]

JOHN F. MULLEN, PETITIONER, v. JOHN HUNT, JUDGE,
ETC., ET. AL., RESPONDENTS.

JUSTICE'S COURT—APPEAL—UNDERTAKING—DEPOSIT.—Section 978 of the Code of Civil Procedure authorizes an appellant from a judgment of a Justice's Court to make a deposit of money in lieu of an undertaking on appeal. Such a deposit should be transmitted to the clerk of the Superior Court as security on the appeal.

ID.—WITHDRAWAL OF DEPOSIT—ABANDONMENT OF APPEAL.—After the statutory time for filing an undertaking has expired, the appellant cannot withdraw the deposit previously made by him, and in lieu thereof file an undertaking. If he does so, it will be considered an abandonment of the appeal.

APPLICATION for a writ of prohibition.

The facts are stated in the opinion of the court.

John J. Coffey, and *W. H. Thompkins*, for Petitioner.

P. J. Van Loben Sels, for Respondents.

MORRISON, C. J. — This is a petition for a writ of prohibition to prevent the respondent from trying a certain cause pending in his court. The facts upon which the petitioner relies may be briefly stated as follows: The petitioner recovered a judgment in a Justice's Court in the city of San Francisco, against one John F. Revalk in the sum of \$50 and \$33.50 costs, on the 22d day of September, 1884. On the 29th day of the same month, a notice of appeal and an undertaking in due form were filed in said action. On the 2d day of October a notice of exception to appellant's sureties was duly given and filed, and on the 4th day of October a notice of justification of the sureties on the appeal was duly given, but the sureties failed to appear and justify according to law; but on the 7th day of October the defendant deposited in the Justice's Court the sum of \$100, a sum equal to double the amount of the judgment, and the further sum of \$83.50 in gold coin in lieu of an undertaking on appeal.

It is claimed by the petitioner that there is no law authorizing such a deposit; but in this counsel is mistaken, as there is a section of the Code authorizing such deposit in the place of an undertaking. Section 978 of the Code of Civil Procedure provides that a deposit of the amount of the judgment including

costs with the justice or judge is equivalent to the filing of the undertaking, and in such case the justice or judge must transmit the money to the clerk of the Superior Court to be by him paid out on the order of the court. When the money was deposited in the Justice's Court it should have been transmitted to the clerk of the Superior Court, as a security on appeal, and it took the place of an undertaking. But pending the appeal the money was withdrawn by the appellant and an undertaking filed in lieu thereof. This undertaking was filed after the time allowed by the statute for filing thereof, and, in our opinion, was filed without any law authorizing it. It is true it was done by an order of the court, but the court had no power to make an order which in effect extended the time for filing an undertaking on appeal beyond the thirty days fixed by the Code. The undertaking thus filed may be left out of the case; and we find an attempted appeal without any security for judgment or costs. It was the voluntary act of the appellant in withdrawing the deposit and we think he thereby abandoned his appeal.

It follows, from the foregoing reasoning, that there was no appeal pending in the Superior Court, after the withdrawal of the deposit, and no case for that court to try. It was therefore without jurisdiction in the case, and the motion to dismiss the appeal should have been granted. The order made on the 7th day of March, 1885, in response to said motion to dismiss, allowing the appellant to file another undertaking on appeal, was without authority of law and void.

Writ ordered as prayed for.

McKEE, J., MCKINSTRY, J., ROSS, J., SHARPSTEIN, J., MYRICK, J., and THORNTON, J., concurred.

[No. 8775. In Bank.—May 25, 1885.]

PETER C. SCOTT, APPELLANT, v. THE SIERRA LUMBER COMPANY, RESPONDENT.

TRUST—SALE BY TRUSTEE—PURCHASE FOR BENEFIT OF TRUSTEE—FRAUD.—Where a deed of trust authorizes the trustees upon default to sell the trust property at public auction for cash, a sale to a third person who purchased in pursuance of an agreement with the trustees that he should pay nothing for the property, and should hold it subject to the direction of the trustees, is fraudulent, and will be set aside at the instance of a party beneficially interested in the proceeds of the sale.

ID.—RECORDING—CONSTRUCTIVE NOTICE.—Where a deed of trust conveys both real and personal property the recording thereof as a conveyance of real estate does not operate as constructive notice of the transfer of the personal property.

EVIDENCE—OBJECTION TO ADMISSIBILITY—APPEAL.—An objection to the admissibility of evidence if not made on the trial, cannot be raised for the first time in the Supreme Court.

PLEADINGS—EQUITY.—Upon a construction of the pleadings, *held*, that the action was equitable.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The action was brought to recover the possession of certain real and personal property and damages for withholding the possession. The property in question was owned by the firm of Campbell & Welton, who becoming financially involved on February 1, 1876, conveyed it by a deed of trust to four trustees for the benefit of their creditors, whose claims were consolidated in a promissory note to the trustees for \$196,139.82 payable in instalments. Campbell & Welton subsequently sold the property to the Sierra Flume and Lumber Company. This company in part consideration of the purchase, assumed the indebtedness of Campbell & Welton to their creditors, and by payments thereon reduced it to \$127,050. The company failed in 1878, and went into bankruptcy. The defendant was formed by a part of the creditors of the Sierra Flume and Lumber Company, for the purpose of acquiring by purchase the property of the bankrupt corporation. This it did. Default having been made in the payment of the indebtedness secured by the deed of trust, the trustees sold the property to the plaintiff on April 28, 1879. The further facts are stated in the opinion of the court.

George Cadwalader, for Appellant.

The delivery to the plaintiff of the trustee's deed without the payment of the bid did not make the deed void. It gave him the legal title to the property and power to maintain this action even though his title had been acquired by fraud or held by him in trust. (*Clark v. Lockwood*, 21 Cal. 220; 1 Perry on Trusts, § 334; *Shortz v. Unangast*, 3 Watts & S. 55; *Canoy v. Troutman*, 7 Ired. 155.)

Cope & Boyd, also for Appellant.

The effect of the trustee's deed as a transfer of the legal estate does not depend upon a proper execution of the trust in making the sale. If made in violation of the trust it may be impeached in equity, but not at law. (*Canoy v. Troutman*, 7 Ired. 155; *Shortz v. Unangast*, 3 Watts & S. 55; 1 Perry on Trusts, §§ 321, 334; *Hill on Trustees*, § 778.) The action is legal, and the mere fact that temporary equitable relief is asked does not change its character. (*Natoma W. & M. Co. v. Clarkin*, 14 Cal. 544; Code Civ. Proc. § 526; *Pomeroy on Remedies*, §§ 76-86; *White v. Lyons*, 42 Cal. 279; *Leonard v. Rogan*, 20 Wis. 540; *Graves v. Spicer*, 58 Barb. 349.)

E. B. Mastick, and *C. A. Garter*, for Respondent.

A trustee cannot directly or indirectly become the purchaser at his own sale, therefore the sale to the plaintiff was void as he bought for the trustees. (*Tracy v. Colby*, 55 Cal. 67; *Wilbur v. Lynde*, 49 Cal. 290; *San Diego v. S. D. etc. R. R. Co.* 44 Cal. 106; *Cumberland Coal Co. v. Sherman*, 30 Barb. 553; *Davis v. Rock Creek L. Co.* 55 Cal. 359; *Scott v. Umbarger*, 41 Cal. 410; Civ. Code, § 2229.)

McKINSTRY, J. — The power contained in the deed of trust recited in the complaint and findings, empowered the trustees in case of certain default, to sell at public auction for "gold coin" or cash. The court below found that the trustees offered the real and personal property (except two lots in Red Bluff) for sale, "and struck off the same to the plaintiff, who, at their request and for them, bid the sum of \$50,000, upon the distinct understanding that he was not to *pay any money*, or take or have

any interest in the property, otherwise than in trust for them." It is said by appellant there was no evidence to sustain the foregoing finding. But there was evidence that the plaintiff bid off the property at the request of the trustees, with the understanding that he should pay nothing, and that in fact he paid nothing. It is suggested the pretended purchase was not made "for" the trustees but for the creditors. There was evidence tending to prove that *some* of the creditors assented to a proposition that a sale should take place and that the nominal purchaser should hold the legal title in trust for them and other creditors. Even if it should be conceded that the trust could be thus diverted, there was no evidence that all or a majority in number or amount of the creditors agreed orally or otherwise to such an arrangement. There can be little doubt that a pretended purchase made at the request of the trustees and with the understanding that the title so acquired should be subject to their direction, was made for the trustees. There was evidence to uphold this view of the facts.

The defendant in its answer averred that the purchase was made in the name of the plaintiff, but to and for the use of Kraft, one of the trustees, and the court found that it was without consideration and for all the trustees. The finding, although somewhat broader in terms, is no broader in legal effect than the allegation of the answer. It would seem to be unnecessary to argue that a power to sell at auction for cash, did not authorize the trustees to convey the legal title to a third person without consideration. It is said, however, that the creditors only could complain of the manner of the sale. But the instrument of trust provides that, after payment of the debts due to the creditors and certain expenses, the balance or surplus of the proceeds of the sale for cash "shall be paid to the parties of the first part, their heirs or assigns." Thus Campbell & Welton and their assigns were interested in the due execution of the power of sale, not only as grantors of the legal estate and donors of the special power, but also as contingent beneficiaries. Neither Campbell nor Welton, nor any of their assigns, agreed to surrender their interest in the estate or its proceeds, and to receive therefor a claim against the trustees as such, or in their individual capacities; if, indeed, the transaction with respect to the sale can be held to have been intended to create such liability.

It is said the deed from the trustees conveyed the legal title on which plaintiff can recover the possession at law, and we are asked to treat the present as an action at law, combining the actions known among us as "ejectment" and "claim and delivery" of personal property.

The court below found that the trustees never received possession of any of the real or personal property described in the complaint, but that Campbell & Welton delivered possession of all the property to the Sierra Flume and Lumber Company, to whom the same was sold for a valuable consideration, \$275,000. An allegation of the complaint is: "Campbell & Welton sold all the property (excepting lots 13 and 14, in block No. 13, in the town of Red Bluff), to the Sierra Flume and Lumber Company . . . for the price of \$275,000, out of which said Sierra Flume and Lumber Company retained the amount of said promissory note," etc. This is a very clear admission and statement that the Sierra Flume and Lumber Company were purchasers for value. There is no finding that the Sierra Flume and Lumber Company, or the trustees in bankruptcy, or defendant, had actual notice of the transfer of the personal property to the trustees. The record of the deed of trust operated no constructive notice of the transfer of *personal* property.

It may be conceded that the general power of the trustees to sell and convey was co-extensive with their legal ownership, and that such power was entirely distinct from the special power to sell contained in the deed, and as a consequence, that the deed to plaintiff passed the naked legal title to the lands therein described.

There can be no doubt, however, that if plaintiff had commenced an action of ejectment the defendant could have filed a cross-complaint praying that the sale and conveyance to plaintiff be set aside.

But the present suit cannot be upheld as an action at law for the recovery of the possession of the real property. Even if the averment of probative facts as to the transfer of the legal title to the real estate could be held to be sufficient in the action here known as "ejectment," plaintiff has not contented himself with alleging a transfer by deed of the legal title to the trustees, and from the trustees to himself, but has averred an exact execution

of the special power of sale set forth in the deed of trust. Thus the plaintiff tendered an issue as to the due execution of the special power, an issue which, as claimed by appellant, could not have been tried in an action at law; an issue proper to be determined in a court of equity. It is urged by appellant that the allegation of the complaint that the sale was at public auction, to the highest bidder, *for cash*, is not denied by the answer. But the answer denies that the trustees had power to make the sale and alleges that the purchase was for the trustees. The testimony that the sale was not for cash, nor as required by the special power, was admitted without objection on the part of the plaintiff. Had objection to the testimony been taken in the court below the answer might have been amended so as to render it strictly admissible. (*Stringer v. Davis*, 30 Cal. 318; *Clark v. Phoenix Ins. Co.* 36 Cal. 175.) But a party cannot for the first time in this court object, on any ground, to evidence which was introduced by the adverse party at the trial in the court below without objection made thereto. (*Bliss v. Ellsworth*, 36 Cal. 310.) Where evidence is not objected to in the court below, because not admissible under the averments of the answer, it is too late to raise the objection in the Supreme Court. (*Hutchings v. Castle*, 48 Cal. 152; *Henry v. S. Pa. R. Co.* 50 Cal. 176.) The issue tendered by the plaintiff was in fact tried and the case is here to be treated as if the answer had specifically denied that the sale was at public auction, or to the highest bidder for cash. This equitable issue having been (in effect) made and tried, defendant ought not to be deprived of the benefit of a finding in its favor, as to the execution of the special power of sale and the validity of the conveyance based upon the sale, merely because of its omission to *pray* that the sale be set aside and the conveyance annulled. But, not only do the averments as to the due execution of the special power and the counter-statement of defendant present an issue of fact to be tried appropriately only in a court of equity, but the whole tenor of the complaint indicates a purpose to resort to the court as a court of equity. The complaint concludes with the general prayer, "for such other and further relief as the equity of the case may warrant." Instead of the brief and comprehensive averments held to be sufficient in the action at law, the complaint contains a long

recital of probative facts, many of which would have no place in the evidence, treating the action as simply one at law, and including statements of special equities upon which was based an application for the appointment of a receiver. A receiver was in fact appointed by the court below. A receiver cannot be legally appointed in an action of ejectment. (*Bateman v. Superior Court*, 54 Cal. 285.)

Plaintiff selected his forum, and having appealed to a court of equity, was not entitled to have that court try an ejectment, even if his bill should have been dismissed on the ground that he had a complete remedy at law. But he asked for appropriate decree in equity, and if he had got all implied by his allegations and prayer the sale under the special power would have been *validated*. Even if we would be justified in any case in culling separated allegations from a complaint purporting to be an application to the equity side of the Superior Court, and disregarding all other portions of the pleadings, in uniting such separated allegations and creating out of them a sufficient complaint at law, we would not be justified in doing so for the purpose of maintaining a technical right to the possession on the part of the holder of the naked legal title acquired under a sale found (upon an issue actually made) to have been a violation of the trust.

In the view we have taken it is not necessary to consider the effect of the releases introduced by defendant.

The judgment and order denying a new trial are affirmed.

SHARPSTEIN, J., MYRICK, J., and ROSS, J., concurred.

Rehearing denied.

[No. 8850. Department One.—May 28, 1885.]

SAMUEL BARNETT ET AL., RESPONDENTS, v. COUNTY OF
CONTRA COSTA, APPELLANT.

COUNTIES—LIABILITY FOR INJURIES FROM DEFECTIVE BRIDGE.—A *quasi* corporation, such as a county, is under no common-law obligation to repair highways, streets, or bridges within its limits; and even when the legislature enjoins such a duty, a county is not liable to be sued for damages caused by neglect to perform the duty, unless the action is expressly given by statute. Section 50 of the act, entitled "an act concerning roads and highways in Contra Costa County"—Stats. 1875-76, p. 237—which makes the county "responsible for providing and keeping passable and in good repair, bridges and all public highways," does not create such a liability.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Eli R. Chase, and Flournoy, Mhoon & Flournoy, for Appellant.

The county is not a municipal corporation. (*People v. Sacramento County*, 45 Cal. 692; *Dillon on Municipal Corp.* § 10; *Potter on Corp.* § 420.) It is an involuntary *quasi* corporation. (*Hunsaker v. Borden*, 5 Cal. 288; *Price v. Sacramento*, 6 Cal. 254; *Sherbourne v. Yuba Co.* 21 Cal. 113; *Boone on Corp.* §§ 10, 314; *Dillon on Corp.* § 10, citing *Hamilton Co. v. Mighels*, 7 Ohio St. 109.) Counties are not liable to persons injured by the wrongful neglect or wrongful acts of their officers, unless such liability be expressly imposed by statute. (*Symonds v. Supervisors etc.* 71 Ill. 355; *State v. St. Louis Co. Court*, 34 Mo. 546; *Peters v. State*, 9 Ga. 109; *Scales v. Ordinary etc.* 41 Ga. 221; *Dillon on Corp.* § 762, citing *Treadwell v. Commissioners*, 11 Ohio, 190; *Hedges v. Madison*, 1 Gilm. 567; *Freeholders v. Strader*, 3 Har. (N. J.) 108; *Dillon on Corp.* §§ 786, n., 996; *Crowell v. Sonoma Co.* 25 Cal. 313; *Huffman v. San Joaquin Co.* 21 Cal. 427; *Winbigler v. Los Angeles*, 45 Cal. 36; *Oliver v. Worcester*, 102 Mass. 489; *Chidsey v. Canton*, 17 Conn. 475; *Mower v. Leicester*, 9 Mass. 247; *Reed v. Belfast*, 20 Me. 248.) The plaintiff has her action against the supervisors. (Pol. Code, § 4086; *Santa Cruz R. R. Co. v. Santa Cruz Co.* 62 Cal. 181.)

Naphtaly, Freidenrich & Ackerman, and L. Quint, for Respondents.

Section 50 of the Act of 1876 was designed to fix the liability on the *county*. (Stats. 1875-76, p. 237; 1877-78, p. 611; 1855, pp. 51, 192; Pol. Code, §§ 4000, 4001, 4003.)

Ross, J. — "In the United States *there is no common-law* obligation resting upon *quasi* corporations, such as counties, townships, and New England towns, to repair highways, streets, or bridges within their limits, and they are not obliged to do so unless by force of statute. Even when the legislature enjoins upon corporations of this character the duty to make and repair roads, streets, and bridges, and confers the power to levy taxes therefor, the general tenor of the decisions is to treat this as a *public* and not a *corporate* duty, and to regard such corporations, in this respect, as *public or State agencies*, and not liable to be sued civilly for damages caused by the neglect to perform this duty, unless the action be expressly given by statute." (2 Dillon Mun. Corp. § 996.) Such is the rule in this State. (*Sherbourne v. Yuba Co.* 21 Cal. 113; *Huffman v. San Joaquin Co.* 21 Cal. 427; *Crowell v. Sonoma Co.* 25 Cal. 313; *Winbigler v. Los Angeles*, 45 Cal. 36.)

It is said for the plaintiff that the legislature, by section 50 of the act, entitled "an act concerning roads and highways in Contra Costa County" (Stats. 1875-76, p. 237), has made that county responsible in damages for injuries resulting from defective bridges therein. The section reads as follows: —

"The county is responsible for providing and keeping passable and in good repair bridges and all public highways; and the supervisors must appoint semi-annually a special meeting, at which the road overseers, on days set apart for their respective districts, to hear highway and bridge reports and complaints from officers and citizens, when such orders must be made and such action had regarding the same as the public welfare demands."

It is not an easy matter to say exactly what this language does mean, but we are inclined to think that its effect, which is in harmony with previous provisions of the act, simply is to put upon the county, through its supervisors and road overseers,

the responsibility and duty of keeping passable and in good repair all bridges and public highways within the county. It certainly does not say that the county shall be responsible in damages for a failure to keep the bridges in repair, nor in our opinion, is such the effect of the language used. The rule that the county was not responsible for injuries in such cases was firmly established by the decisions in this State at the time the act in question was passed; and if the legislature had intended to alter it, it is to be presumed that it would have used appropriate language for the purpose. Certainly, it ought not to be held that an established rule of law has been changed by doubtful and ambiguous language.

Judgment and order reversed, and cause remanded.

McKINSTRY, J., and McKEE, J., concurred.

[No. 8343. Department One.—May 28, 1885.]

GEORGE F. NIDEVER, BY HIS GUARDIAN AD LITEM, E. NIDEVER, RESPONDENT, v. R. F. HALL, APPELLANT.

SLANDER—WORDS NOT ACTIONABLE PER SE—PLEADING EXTRANEOUS FACTS—BURDEN OF PROOF—EVIDENCE.—In an action for slander, where the words spoken were not actionable *per se*, and the complaint alleges extraneous facts showing their slanderous meaning, the plaintiff must prove such extraneous facts, and the defendant may give evidence to the contrary under a general denial.

Id.—UNDERSTANDING OF WORDS BY HEARERS.—In such a case, the plaintiff must aver and prove that the words were actually used in their actionable sense, and were applied to him, and that the hearers so understood them. Upon this latter point, the testimony of the hearers, as to how they understood the words, is admissible.

APPEAL from a judgment of the Superior Court of Monterey County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

A. S. Kittredge, A. Craig, and S. F. Geil, for Appellant.

H. V. Morehouse, for Respondent.

McKEE, J. — This is an action of slander. Substantially the charge is, that pending an action for seduction, brought by Barbara M. Hook against James A. Hall, R. F. Hall, the father of the said James A., in the presence of the father of the plaintiff in this case, and in the presence of several other persons, published of and concerning the plaintiff these words: "He (the plaintiff) virtually acknowledged to me that he had sexual intercourse with Barbara M. Hook"; and that by the publication of these words to his father and to the other persons, pending the suit for seduction, the defendant intended to impute to him a want of chastity.

At common law the words laid in the complaint were not actionable in themselves, or by reason of the existence of extraneous acts and circumstances tending to prove that they were spoken for the purpose of imputing a want of chastity, because unchastity as a subject of ecclesiastical cognizance was not punishable in common-law courts. In that particular, however, the common law has been changed by the Code law of the State. Section 46 of the Civil Code declares: "Slander is a false and unprivileged publication other than libel, which: —

"1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

"2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

"3. Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;

"4. Imputes to him impotence or a want of chastity; or,

"5. Which, by natural consequence, causes actual damage."

And upon subdivision 4 of the section this action was brought.

Plaintiff did not consider the words laid in his complaint as slanderous in themselves; he, therefore, connected them by proper averments with the extrinsic facts and circumstances in which they were published in order to show the slanderous meaning expressed by them.

On the complaint defendant took issue by specific denials of each of its averments; and he affirmatively alleged that there was, in general circulation, in the neighborhood and surrounding county where Barbara M. Hook and the plaintiff resided, a report prejudicial to the character of the plaintiff as to his chastity, in connection with the name of the said Barbara, and for the purpose of ascertaining the truth of the report he interviewed the plaintiff himself on the subject; and in that interview the plaintiff acknowledged that the report was true; and afterwards, when the father of the plaintiff and other persons made inquiries of him as to the matter, he spoke to them the words laid in the complaint, without meaning or intending thereby to assert or charge that the plaintiff was, in fact, guilty of unchastity.

The issues raised by the answer involved the publication of the words laid in the complaint, the truth or falsity of the extrinsic facts and circumstances in which they were published, whether they were published concerning the plaintiff, and whether they were understood by the persons in whose presence they were published to have the slanderous meaning imputed to them.

On the trial of the questions at issue plaintiff rested his case, upon evidence tending to prove the publication of the words as averred in his complaint, the pendency of the action for seduction, and the conversations between defendant and himself and defendant and other persons, as to the transactions involved in that action, without evidence that the persons with whom the defendant had those conversations understood the meaning of the words to be what the plaintiff alleged. There was a motion made for a nonsuit which was denied. The defendant was then called as a witness in his own behalf, to testify as to the conversations between himself and the plaintiff and other persons in connection with the charge against him, the transactions involved in the seduction case, and the facts and circumstances in which he spoke the words laid in the complaint, but the plaintiff objected "to any testimony being introduced on the part of defendant for purposes of justification," and the court sustained the objection on the ground that the defendant had not pleaded justification; therefore the testimony of the defendant was

excluded from the case except in mitigation of damages, for which purpose only it was admitted. This was error.

The action was founded not only upon the publication of the words, but upon the extrinsic facts in connection with their publication, which it was alleged, gave them their slanderous meaning; and as the defendant took issue with the averments of the complaint, the plaintiff, to make out his case, was bound to prove all the material averments; and the defendant, on the general issue, had the right to disprove them. The law of that subject is thus clearly expressed by Shaw, C. J., in *Carter v. Andrews*, 16 Pick. 6: "Where words are used in a particular sense it is in consequence of some usage or agreement, or of some report in circulation, or of the time, place, or manner in which the conversation was held; in short, of some fact, capable of being averred in a traversable form, so that it may be put in issue and proved or disproved. If the words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of the existence of some extraneous fact, the plaintiff must undertake to prove that fact and the defendant must be at liberty to disprove it." The exclusion of the testimony was therefore erroneous, and, as the words in themselves were not actionable, and the plaintiff failed to prove that the persons, in whose presence they were published, understood them to have the slanderous meaning charged by the plaintiff, the judgment is erroneous.

It has been held that persons who heard the words charged to be slanderous, could not be permitted to state what meaning they understood the defendant to convey by the words. In *Snell v. Snow*, 13 Met. 278, which was a case of slander, Shaw, C. J., passing on this point, says: "The judge very properly decided that the witness might testify as to any existing facts or circumstances to which the defendant alluded and referred, if any; but having given the whole conversation, it was for the jury to determine what was meant by the language used, and that it was not competent for the witness to testify to his understanding of the defendant's meaning in the language used. If the words in their ordinary sense, according to the rules of language, imputed a charge of unchasteness and crime, or if taken in connection with other facts or words, they would bear that meaning, we are to presume that the jury would so find."

To the same effect will be found the cases of *Van Vechten v. Hopkins*, 5 Johns. 211; 4 Am. Dec. 339; *Gibson v. Williams*, 4 Wend. 320, 325; *Beardsley v. Maynard*, 4 Wend. 359; *Goodrich v. Davis*, 11 Met. 484; and *White v. Sayward*, 33 Me. 322.

But in such cases as the one under consideration, the true rule deducible from the modern authorities, including those of our own State, makes the averment and proof of the extrinsic facts in which words are published, and of their meaning in connection with those circumstances, essential to a recovery in the action. The rule is thus stated in *Maynard v. Firemen's Fund Insurance Company*, 34 Cal. 48: "Where in an action for libel the words complained of are not *per se* libelous, what the defendant intended and understood them to mean, and what they were understood to mean by those to whom they were published, constitute a proper subject of averment in pleading and of proof on the trial, and if what was so intended and understood by the defendant and understood by those to whom the words were published was libelous, the words are actionable." The law thus enunciated was afterwards approved in *Chamberlain v. Vance*, 51 Cal. 75, which was an action of slander like the one under consideration; and under the law it was incumbent on the plaintiff in this case in order to recover, to aver and prove: (1) That the words were actually used in their actionable sense, and were applied to the plaintiff. (2) That the hearers so understood them; and upon this point, the testimony of the hearers as to how they understood them is admissible. (*Smart v. Blanchard*, 42 N. H. 149; *Russell v. Kelly*, 44 Cal. 641; *Mix v. Woodward*, 12 Conn. 262; *Nelson v. Borchentius*, 52 Ill. 236; *Briggs v. Byrd*, 11 Ired. 353; *Tompkins v. Wisener*, 1 Sneed. 458; *Leonard v. Allen*, 11 Cush. 271.)

The averments of the complaint upon these points were sufficient, but as the plaintiff failed to prove how the words were understood by the persons who heard them, he failed to make out his case, and the verdict and judgment are erroneous.

Judgment and order reversed and cause remanded for a new trial.

Ross, J., concurred.

McKINSTRY, J., concurred in the judgment.

Hearing in Bank denied.

[No. 8256. Department One.—May 28, 1885.]

PAULINA WEIHE ET AL., APPELLANTS, v. A. H. STATIAM ET AL., RESPONDENTS.

ESTATE OF DECEDENT—PAYMENT OF UNLAWFUL CLAIM—ACTION ON BOND—ACCOUNTING.—The heirs of an intestate cannot maintain an action on the bond of an administrator to recover for a misappropriation of the funds of the estate until after an accounting has been had in the Probate Court, and the administrator has refused to pay the amount adjudged against him.

APPEAL from a judgment of the Superior Court of Fresno County.

The facts are stated in the opinion of the court.

H. S. Dixon, for Appellants.

Sayle & Harris, and *Bennett & Wigginton*, for Respondents.

ROSS, J. — This is an action by the heirs of William W. Hill, deceased, against the administrator of the estate and his bondsmen to recover upon the bond, because of the allowance by the administrator and the probate judge of a claim against the estate alleged to have been barred by the Statute of Limitations and otherwise invalid, and its subsequent payment in part by the administrator, but without an order of the Probate Court. It affirmatively appears from the complaint that the administration of the estate of the deceased Hill is still pending in the Probate Court, and that no account of his administration has been presented by the administrator. It has several times been decided by this court that the allowance of a claim by the administrator and probate judge is not conclusive upon the heirs, but that they may contest such allowance in subsequent proceedings of the Probate Court. (Code Civ. Proc. § 1636; *Estate of Loshe*, 62 Cal. 413; *Estate of Hill*, 62 Cal. 186.) If the allowance of the claim sought to be contested by the present suit was improperly had, and objection is made at the proper time in the Probate Court having control of the administration, that court will doubtless vacate the allowance and compel the administrator to account for the money paid thereon out of the funds of the estate. It is for the Probate Court to settle the accounts of the administrator, and we have frequently so held. (*In re Curtiss*, 65 Cal. 572;

Chaquette v. Ortet, 60 Cal. 594; and the authorities there cited.) After the *status* of the accounts has been fixed, if the administrator shall fail to pay what, if anything, may be adjudged against him, the plaintiffs will have their action upon the bond.

Judgment affirmed.

McKINSTRY, J., and McKEE, J., concurred.

[No. 11053. Department One.—May 28, 1885.]

GEORGE RUTLEDGE, PETITIONER, v. THE SUPERIOR COURT OF HUMBOLDT COUNTY ET AL., RESPONDENTS.

APPEAL—NOTICE OF—SIGNATURE OF ATTORNEY.—The omission of the persons signing a notice of appeal from a judgment of a Justice's Court to designate themselves as attorneys for the appellant will not render the notice ineffectual if it is otherwise sufficient.

PETITION for a writ of prohibition to prohibit the Superior Court of Humboldt County, and the judge thereof, from proceeding to hear and determine an action entitled *Burns v. Rutledge*, on appeal from a Justice's Court. The further facts are stated in the opinion of the court.

A. J. Monroe, and S. M. Buck, for Petitioner.

J. D. H. Chamberlin, and Frank McGowan, for Respondents.

ROSS, J. — In an action brought in a Justice's Court entitled *Burns v. Rutledge*, judgment was entered for defendant for \$10 damages, and \$246.20 costs of suit. The plaintiff's attorney of record thereupon, and within statutory time, served upon the attorneys for the defendant, and filed with the justice a notice of appeal, in the usual form, stating that the plaintiff thereby appealed to the Superior Court of Humboldt County, "from the judgment made and entered in Justice's Court in said action, against plaintiff and in favor of said defendant, on the 26th day of August, 1884, and from the whole thereof; and you will further take notice that this appeal is made upon both questions of law and fact, and that a bond on appeal, in due form of law,

has been filed herewith. September 22, 1884. Very respectfully yours, [signed] J. D. H. CHAMBERLIN and FRANK McGOWAN."

The objection made to this notice is that the words "attorneys for plaintiff" did not follow the names of the gentlemen signing the notice. None of the cases referred to by the counsel for petitioner at all sustain the point, and we think there is no merit whatever in it. The notice was signed by the attorneys who appeared for the plaintiff in the case, and distinctly stated that the plaintiff thereby appealed from the judgment. The notice was sufficient.

That the undertaking was sufficient to give the appellate court jurisdiction was distinctly held here in the case of *Ward v. Superior Court*, 58 Cal. 519.

Writ denied, and proceedings dismissed.

McKEE, J., and MCKINSTRY, J., concurred.

[No. 9030. In Bank.—May 23, 1885.]

THE OAKLAND BANK OF SAVINGS, APPELLANT, v.
JOHN APPLGARTH, RESPONDENT.

TENDER—INSUFFICIENT AMOUNT.—A tender is not invalidated by insufficiency in the amount tendered, if no objection be made at the time as to the amount.

APPEAL from a judgment of the Superior Court of Merced County, and from an order refusing a new trial.

Action to foreclose a mortgage. The facts are stated in the opinion of the court.

J. K. Law, for Appellant.

W. S. Goodfellow, and *E. Jackman*, for Respondent.

Ross, J. — Certain costs of suits, counsel fees, and taxes are matters in dispute on this appeal. The action was brought to foreclose a certain mortgage given by defendant to secure a promissory note executed by him to the plaintiff. The note

and mortgage being overdue were sent by plaintiff to an attorney at Merced for purposes of foreclosure, and the evidence indicates a sort of race between the attorney and the derelict debtor as to which of two events should first take place, a tender of the money by the debtor, or the institution of the suit by the attorney. The court below found that the tender was first made, and we are not prepared to say from the record that its conclusion in that behalf was incorrect. The court further found that the amount tendered by the defendant was \$6,344.55, whereas the amount that was really then due from him was \$6,383.29, so that the full amount due was not tendered. But the court found also "that plaintiff did not make or specify any objection to said sum of \$6,344.55, or to the amount thereof, nor did plaintiff specify any other as the amount which it required, but then and there refused, and ever since has refused, to accept from defendant said sum, or any part thereof; that defendant has at all times been ready and willing to pay to plaintiff said sum of \$6,344.55, and did at the time of filing his answer herein bring into court and deposit therein, for the plaintiff, the said sum of \$6,344.55, so tendered to plaintiff as aforesaid."

The court below further found "that prior to said 1st day of September, 1882 (the date of the tender), the value of said mortgage was assessed to plaintiff in the county of Merced, for State and county taxes for the fiscal year ending June 30, 1882, but said 1st day of September, 1882, was before the tax levy of said fiscal year; that the amount of such levy, in respect to said mortgage assessed to plaintiff as aforesaid, computed according to the tax levy for the preceding year, was the sum of \$113.60, and that defendant was, on said 1st day of September, 1882, entitled to retain and deduct from the amount due on the face of said note and mortgage the said sum of \$113.60, upon satisfying the mortgage. The court therefore finds that the sum of \$6,344.55 tendered by defendant to plaintiff on the 1st day of September, 1881, was more than plaintiff was entitled to recover upon said note and mortgage on said day."

This view of the court below was based upon that provision of section 3627 of the Political Code, wherein it is declared that the taxes therein referred to "shall be a lien upon the property and security, and may be paid by either party to such security;

if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured. If the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and, to the extent of such payment, a full discharge. If any such security or indebtedness shall be paid by any such debtor or debtors after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year."

In so far as the question of costs and counsel fees is concerned, it is not necessary to determine whether or not the views of the court below, in the respect last indicated, were correct; for, by section 2076 of the Code of Civil Procedure, it is provided that "the person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards." This provision of the statute, applied to the facts stated in the finding first above set out in detail, precludes the plaintiff from now saying that because the amount tendered by defendant was \$38.74 less than the amount due on the note and mortgage, the tender was not good.

But in one respect the court below was in error. In addition to the findings already noticed the court found that the State and county taxes upon the mortgage assessed to plaintiff for the fiscal year ending June 30, 1882, and amounting to \$113.60, were not paid by plaintiff, but became and were, prior to February 2, 1883, a lien upon the property of defendant in the mortgage described; and on the 12th day of February, 1883, the defendant paid the said taxes, with costs and charges thereon, amounting, in the aggregate, to \$121.36. The court further found "that the said sum of \$6,344.55, deposited in court by defendant as aforesaid, was assessed for taxes to the county treasurer of Merced County for the fiscal year ending June 30, 1883, and that the taxes thereon, amounting to the sum of \$126.89, were, on the 31st day of March, 1883, paid under the

direction of the court by said county treasurer out of said sum of \$6,344.55." The effect of the action of the court below was to make the plaintiff pay the taxes upon the mortgage, and also upon the money. This was erroneous. It was rightly held that plaintiff should not recover costs of suit or counsel fees, and should be charged with the amount of the taxes upon the mortgage, paid by defendant, but should not be charged with the taxes upon the money. Defendant is entitled to his costs of suit.

Cause remanded, with direction to the court below to modify the judgment so as to accord with these views. Motion to dismiss appeal will stand denied.

MORRISON, C. J., MYRICK, J., MCKINSTRY, J., and SHARPSTEIN, J., concurred.

On the 17th of June, 1885, the following modification was made:—

The COURT.—It appearing to our satisfaction that the assessments upon the mortgage, and the money deposited for its satisfaction in the county treasurer's office, were not for one and the same year, but for different years, the judgment of this court is hereby modified by striking out so much of it as directs a modification of the judgment of the court below; and said last named judgment is affirmed.

[No. 8730. Department Two.—May 29, 1885.]

HENRY MYERS, RESPONDENT, v. O. REINSTEIN ET AL.,
EXECUTORS, ETC., OF MARCUS REINSTEIN, DECEASED, ET
AL., APPELLANTS.

RESULTING TRUST—ACTION TO ENFORCE—EVIDENCE—ESTATE OF DECEDENT.—An action to enforce a resulting trust against the personal representatives of a deceased trustee is not founded upon a claim or demand against the estate of the deceased, within the meaning of section 1880 of the Code of Civil Procedure. In such an action, the original *cestui que trust* may testify to facts occurring prior to the death of the trustee.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

J. B. Reinstein, and J. P. Phelan, for Appellants.

Horace Hawes, for Respondent.

THORNTON, J. — This action was brought to establish a resulting trust in a parcel of land claimed to have been purchased by S. H. Collins and M. Reinstein — the latter, testator of defendants O. Reinstein and A. Vaenberg — when partners, and paid for with partnership funds. The parcel had been conveyed to M. Reinstein. The action was brought by plaintiff as the assignee of Collins. Judgment passed for plaintiff. Defendants moved for a new trial, which was denied, and they prosecute this appeal from the judgment and order denying the new trial.

Collins, as stated above, the assignor of plaintiff and the partner of M. Reinstein, who had departed this life before the commencement of this action, was called as a witness and sworn. He had testified that he was the person named as S. H. Collins in the complaint; that he resided in San Francisco, and had business transactions with M. Reinstein in his lifetime. When this question was put to him by plaintiff's counsel, "what transactions did you have with him?" at this point an objection was made by counsel for defendants, as follows: —

"Defendant objected to any testimony on the part of the witness Collins as to such transactions with said Marcus Reinstein, against the executors of said Marcus Reinstein, on the ground that the evidence is incompetent, irrelevant, and immaterial, and specially excluded by section 1880 of the Code of Civil Procedure of the State of California; it appearing from the amended complaint herein, and not denied in the answer, that said Collins is the plaintiff's immediate assignor of the premises in controversy, and the said Marcus Reinstein died before the filing of the complaint herein."

The objection was soon afterwards renewed, substantially, by defendants, as to any testimony of the witness relative to transactions had with Reinstein prior to his death. The objection was overruled. The witness testified fully in relation to transactions of the character referred to in the objection. An exception was reserved by defendants, and the ruling is now urged as error.

We think the objection was so taken as to raise the question of the competency of Collins to testify as to any transaction occurring before M. Reinstein's death. Collins was not a wholly incompetent witness; his incompetency, if any, was a qualified one. He was at any rate competent to testify to any matter relevant to the issues in the cause, occurring subsequently to Reinstein's decease, and in fact some of his testimony was of this character. The objection referred to section 1880 of the Code of Civil Procedure, as rendering him incompetent to testify to the matters covered by the objection. We think this reference, with the other portions of the objection, sufficiently informed the court and the defendants that the objection was to the competency of Collins to the matters specifically referred to by counsel for defendants. The points presented in the form of words adopted by defendants' counsel in stating his objection, was beyond an objection that the testimony of the witness was incompetent, immaterial, and irrelevant. The court below so understood it, and we think it understood it properly. The objection was properly taken *in limine*, before the witness had given any testimony which was within the objection.

The question remains for determination, was Collins a competent witness as to the transactions objected to? If he was not, the court committed an error affecting materially the interests of defendants. If he was competent, there was no error. The objection is based on section 1880 of the Code of Civil Procedure. That section, so far as relates to the question before us, is as follows:—

“The following persons cannot be witnesses: . . . (3) Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator, upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person.”

We are of opinion that the witness was competent. The action was not on a claim or demand against the estate of Reinstein. The plaintiff asserted that the interest in the land sued for constituted no part of M. Reinstein's estate, but was held in trust by Reinstein for Collins or his assigns, and after his death, by the defendants, his devisees, and successors. The defendants

asserted that no such trust existed, but that Reinstein, their devisor, held the lands as his own estate, and that they had succeeded to his right. The very question to be determined here was whether the interest sought to be recovered was a part of Reinstein's estate or not. If it was a part of his estate, then no trust existed; if the trust existed, he held it in trust in his lifetime, and the interest passed to his successors to the legal title, clothed with the trust. To hold that the claim or demand here attempted to be enforced was a part of the estate, and thus render the witness incompetent, would be to determine in advance the very question to be determined on the trial of the action. By so holding we would assume the very question to be tried and settled by the contestation between the parties. This we are not allowed to do. It may be admitted, though we are not now willing to concede it, that it would be, as an abstract question, unjust that Collins should be allowed to testify in the cause while Reinstein's lips are sealed by death. But this was a question for the consideration of the legislature, to be settled by it, and it has not, as we construe the language used by it in framing the section invoked, thought proper to go so far as to apply the rule prescribed by the section to all actions brought against an executor or administrator. The section of the statute in New York is much broader in its language (§ 399 of the New York Code of Procedure; see Voorhies' Code, ed. 1870, p. 626) than that of this State. Our attention has been called to no act or case construing it in any other State where the form of words used in the statute is the same as that adopted in section 1880 of the Code of Civil Procedure.

We have looked into the cases of *Fallon v. Butler*, 21 Cal. 24, and *Estate of McCausland*, 52 Cal. 568, cited by counsel, but they throw little if any light upon the question herein discussed. We refer to them to show that they were not overlooked in considering this case. The evidence of Collins was neither incompetent, irrelevant, nor immaterial, and the testimony in the case was of a character sufficient to establish the trust as claimed by plaintiff.

It follows that the judgment and order must be affirmed; and it is so ordered.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 8715. Department Two.—May 29, 1885.]

G. M. KUTZ, RESPONDENT, v. W. FLEISHER, APPELLANT.

CONTRACT TO PURCHASE AND SELL STOCK—STATUTE OF FRAUDS.—A contract between brokers, whereby one agrees to purchase and sell stocks for the account of the other, to advance money for the purpose, and pay assessments on the stocks purchased, is not obnoxious to section 26, article iv., of the Constitution, and is not required by the statute of frauds to be in writing.

II.—MUTUAL ACCOUNT—STATUTE OF LIMITATIONS.—The action being regarded by the court as one to recover a balance due on a mutual, open, and current account, *held*, that the Statute of Limitations was not a bar.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

Action to recover a balance due for money paid, laid out, and expended by the plaintiff for the use of the defendant, in pursuance of a contract whereby the plaintiff agreed to purchase and sell stock for the defendant, advance the purchase price, and pay the assessments thereon. The further facts are stated in the opinion of the court.

Carl T. Graef, for Appellant.

Napthaly, Freidenrich & Ackerman, for Respondent.

THORNTON, J. — We find no error in this record. It was not a case of a sale of personal property by a vendor to a vendee, but of a broker (plaintiff) purchasing and selling stocks for account of another (defendant), advancing money for the purpose, and paying assessments on the stocks purchased. The whole transaction was had under an agreement entered into in advance of the purchases being made. It was no part of the terms of the agreement that it was not to be performed within one year from the making thereof. On the foregoing facts, it follows that section 26 of article iv. of the Constitution; section 1624, subds. 1, 4, of the Civil Code; section 1793, subds. 1, 4, of the Code of Civil Procedure, have no application in this case.

The agreement as enforced could be made by parol, and therefore section 1739 of the Civil Code has nothing to do with the case. The claim of interest at one and one half per cent

per month was withdrawn. The verdict is not against law, nor is it unsustained by the evidence. It might be improved as to the form, but it is sufficiently certain, and is within the issues. The evidence on which the verdict as to that part of plaintiff's claim, styled in the verdict "stock account," consists of an account mainly between plaintiff and defendant, all of which grew out of buying and selling stocks under the agreement above stated. This sufficiently explains the use of the words "stock account" in the verdict. Granting that a stated account was not proved, a recovery might be sustained on the counts for money lent and money paid.

The cause of action was not barred by the Statute of Limitations. The action is really one to recover a balance due on a mutual, open, and current account, where there had been reciprocal demands between the parties, and in such case the cause of action accrues from the time of the last item proved in the account on either side. The account was proved, and the last item recoverable in this action, on the credit side of the account, bears date 28th day of January, 1882, and on its debit side, November 17, 1881. The cause of action in this case could only be barred in three years from its accrual. The action was commenced on the 20th day of March, 1882. It follows that, computing from either of the above-mentioned dates of last items, the action was not barred. The court committed no error in refusing the requests for instructions preferred by counsel for defendant. They referred to matters not in the case.

The judgment and order must be affirmed. So ordered.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 8634. Department Two.—May 30, 1885.]

JOHN CORCORAN, ET AL., APPELLANTS, v. ISADORE
MERLE ET AL., RESPONDENTS.

EQUITY—BONA FIDE PURCHASER—NOTICE—EVIDENCE.—Upon a review of the evidence, *held*, that the defendant was a *bona fide* purchaser of the land in controversy for value and without notice of the plaintiffs' alleged equities.

APPEAL from a judgment of the Superior Court of the city and County of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

John L. Love, and *James A. Waymire*, for Appellants.

Edward J. Pringle, and *R. R. Provines*, for Respondents.

THORNTON, J. — In this cause, which is an action to redeem certain lands from a mortgage, plaintiffs were, on motion of defendants, non-suited. The mortgage from which plaintiffs claim to redeem was executed by Daniel Jones to Ann Reynolds, on the 12th day of December, 1878, to secure an indebtedness of Jones to Ann Reynolds amounting to the sum of \$6,000, evidenced by Jones' note bearing date on the day last named, with interest, etc. Plaintiffs aver, with a detail of explanatory circumstances, that Jones held the property for them, and as their trustee, and that defendant Merle purchased from Jones with full notice of their rights. They offer to pay the amount found to be due on the mortgage, after crediting the rents and profits received by Merle and Jones, who have been in possession for some time, during which they received rents from the property mortgaged. The defense of Merle, who is really the only defendant, is that he is a purchaser from Jones for a valuable consideration, without notice of any right of plaintiffs, or of either of them.

The facts shown in evidence are as follows: —

On the 12th of July, 1870, the plaintiff and his then wife, Mary, who were then the owners of the land involved in this litigation, borrowed of the Savings and Loan Society \$4,000, and to secure the loan and future advances not to exceed \$6,000, they on the same day executed a deed of trust to B. D. Dean and E. W. Burr, by the terms of which they granted and conveyed this land to the trustees in joint tenancy, and all the estate they then had or might in any way acquire to it. The deed of trust is in form such as is generally used by the society mentioned above. This deed was recorded July 16, 1870. In 1875, Mary Corcoran, above mentioned, died, leaving the plaintiff John her sole heir. In 1876, John married the plaintiff

Annie. On the 27th of May, 1877, the plaintiffs executed a deed of trust to E. W. Burr and J. N. Shotwell to secure a loan of \$6,000, and future advances, not to exceed \$10,000, made to them by the society above mentioned. Both of these loans were evidenced by notes executed by the grantors above named, respectively, at the dates mentioned, to the Savings and Loan Society. On the 18th day of January, 1877, John Corcoran conveyed an interest in the land to his wife, the plaintiff Annie. On the 12th of March, 1878, G. Raisch brought an action in the late Twelfth District Court against the plaintiffs E. W. Burr, J. M. Shotwell, and H. P. Gallagher, executor of the last will of Mary Corcoran, deceased, to charge the land in question with the lien of a street assessment held by Raisch, in which a default was entered on the 29th of March, 1878, decree entered on the 1st of April, and sale regularly made under the decree to Raisch, on the 2nd of May of the same year.

Just before the expiry of six months from the sale just mentioned to Raisch, the plaintiff John Corcoran entered into a negotiation with D. M. Seaton and Charles E. Pearson for the sale to them of the land encumbered as above set forth. It was agreed between John Corcoran, of the one part, and Seaton and Pearson, of the other, that the latter should pay off the indebtedness to the Savings and Loan Society, and the street assessment encumbrance, and pay John Corcoran \$2,500 in addition. An attorney was employed to prepare a deed of the property, by which John Corcoran should, on the above payments being made by Seaton and Pearson, convey to them the above-mentioned land. The deed was drawn up and ready for signature, when, on the last day on which there could be a redemption from Raisch's judgment, one Daniel Jones, as a judgment creditor, filed a notice of redemption from the aforesaid sale under the Raisch judgment. Jones had, or claimed to have, a right to redeem on a judgment before that time recovered in the Municipal Court of Appeals. John Corcoran then refused to sign the deed. It appears that Jones was an instrument of T. P. Riordan and B. J. Shay, who put him in the position to redeem for them from the sale on the Raisch judgment. Shay and Riordan were using the name of Jones, who was a clerk in Shay's office.

The carrying out of the agreement between Corcoran, Seaton, and Pearson was broken off in this way. Corcoran was much embarrassed by the encumbrances on his property above mentioned, and on the advice of Father H. P. Gallagher, applied to T. P. Riordan to help him out. The day before he (Corcoran) was to sign the deed to Seaton and Pearson, he met Riordan in the street, and the latter told him that he and his friend B. J. Shay could do better for him than he was doing in the trade with Seaton and Pearson; that they could either get the property free or get more money for him. Shay was present, and told him that Seaton and Pearson were Yankees and would swindle him; that he and Riordan were Irishmen, and if he (Corcoran) would stick to them (Shay and Riordan), they would see him all to rights, and that he would either get back his property or enough money to go back to Ireland and live in comfort all the rest of his life. Upon this, Corcoran went with Riordan to the office of the attorney and got the deed, which he had declined to execute on November 2, 1878. Before Corcoran had refused to sign the deed, Pearson had paid to the Savings and Loan Society all the money due it by the Corcorans; had taken from it an assignment of the promissory notes executed to it by the plaintiffs, and had obtained a reconveyance to John and Mary Corcoran by Burr and Dean, trustees, under the deed of July 12, 1870. This deed was recorded on the 29th day of January, 1879. Seaton, finding out that Jones was acting for Shay, opened negotiations with him, and discovered that Shay and Riordan were working together to secure the property. Seaton had frequent interviews with Shay and Riordan, and it was finally agreed between them that the property should be conveyed to John S. Barrett, as trustee, to hold for thirty days, and then convey it to Seaton and Pearson, unless within that time Shay and Riordan should pay Barrett for them \$6,000, and in case they paid that sum, that then Barrett should convey to any one they might name. At the suggestion of Shay, Pearson requested Burr and Shotwell, trustees, to advertise the property for sale. They did so, and it was sold on the 4th of December, 1878, to John S. Barrett for \$6,500. There was, in fact, no money paid, and Barrett was not personally a bidder at the sale. Seaton bid it off in Barrett's name,

and the property was knocked down to him at the sale. December 5, 1878, Burr and Shotwell, trustees under the deed of May 21, 1877, for the consideration of \$6,500, conveyed to John S. Barrett all the estate they had derived under the trust deed aforesaid. About that time a sheriff's deed was made to Pearson, who had procured an assignment of the certificate of sale from Raisch, and by Pearson was assigned to Barrett. On the 12th of December, 1878, Barrett received from Shay, and Riordan \$6,000 for Seaton and Pearson, and on the same day Barrett executed a deed conveying the property to Daniel Jones. This deed expressed a consideration of \$20,000. Barrett paid the \$6,000 over to Seaton and Pearson. On the 12th of December, 1878, Daniel Jones mortgaged the property to Ann Reynolds for \$6,000. On the 29th of January, 1879, the deed from Barrett to Jones was recorded.

Such was the state of the title when the defendant Merle purchased of Daniel Jones. The deed of conveyance from Jones to Merle, of the land involved in this suit, bears date of July 3, 1879. Merle testified that before and at the time he paid the money to Jones for the property, and received the deed, he knew nothing of the transactions between Shay, Riordan, and Corcoran, or between Seaton and Pearson and Corcoran, or between Shay and Riordan and Seaton, or Pearson, or any of them, and there is no testimony contradicting this statement. The payment of the purchase money by Merle on the day of the execution of the deed is established by clear and uncontradicted evidence. We find nothing in the documentary evidence in the case to put Merle on inquiry as to these transactions. There was no legal title outstanding in Burr and Dean, trustees under the deed of July 12, 1870, at the time Merle purchased. It had been got in on November 2, 1878, by a deed of release to the plaintiff John Corcoran and Mary Corcoran, and was recorded on the 29th of January, 1879, months before the date of the deed to Merle. As soon as the release above mentioned was made by Burr and Dean, on the 2d of November, 1878, it passed at once by operation of the trust deed to Burr and Shotwell to them, the grantees in the last trust deed; for it must be remembered that the deed last referred to conveyed to the trustees all the title which the grantors then had or might afterwards ac-

quire. If Mary Corcoran was dead in 1878, when the deed of release was executed to John and Mary Corcoran, the whole interest passed to John Corcoran.

We do not think it material that Dean was not made a party to the action brought by Raisch. If in consequence of this, some portion of the title conveyed to Burr and Dean remained in Dean, we do not see why that interest could not be released to John Corcoran, which would pass as above stated to Burr and Shotwell. If he was not a necessary party to the suit of Raisch, then the whole title passed to the purchaser at the sheriff's sale on the Raisch judgment, and the sheriff's deed made thereunder, and this title was conveyed to Jones. In either case the full legal title had passed to Jones long before Merle purchased. The court ruled correctly in finding that Merle was an innocent purchaser, and in ordering a nonsuit.

Judgment and order affirmed.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 20050. In Bank.—May 30, 1885.]

THE PEOPLE, RESPONDENT, v. CHARLES CLARK,
APPELLANT.

CRIMINAL LAW—ONCE IN JEOPARDY—CONVICTION UNDER INSUFFICIENT INFORMATION.—An erroneous conviction under an information which failed to charge the defendant with the commission of any crime will not support a plea of former conviction or once in jeopardy.

APPEAL from a judgment of the Superior Court of Santa Clara County, and from an order refusing a new trial.

The defendant was convicted of the crime of burglary in the second degree. In support of his pleas of former conviction and once in jeopardy the defendant proved that under a former information for the same offense he had pleaded guilty, that this plea had been accepted, and that after taking testimony to determine the degree a verdict of guilty of burglary in the second degree was entered. Afterwards the district attorney dismissed the information. The further facts are stated in the opinion of the court.

Z. N. Goldsby, and J. M. Lesser, for Appellant.

Attorney-General Marshall, and James A. Hall, for Respondent.

THE COURT. — The defendant pleaded not guilty as charged in the information; that he had been previously convicted of the same offense, and also once in jeopardy. The jury found, upon the plea of not guilty, the defendant guilty of burglary in the second degree, and on the other pleas found in favor of the people. Inasmuch as the former information failed to charge the defendant with the commission of any crime, the court below was justified in instructing the jury that the pleas of former conviction and once in jeopardy could not be sustained. The evidence was sufficient to justify the verdict of guilty of burglary in the second degree.

Judgment and order affirmed.

[No. 8990. Department Two.—June 1, 1885.]

A. H. ROSE, RESPONDENT, v. LOUIS FELDMAN,
APPELLANT.

PLEADING—GUARANTY.—A complaint on a written guaranty purporting to be signed by a firm, the action being against a single defendant, does not state a cause of action as to him without showing that he alone is bound by the guaranty; and it is not sufficient to allege that he agreed to give the guaranty, and that he signed it himself.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco on default of the defendant in failing to answer after demurrer overruled.

The facts sufficiently appear in the opinion of the court.

F. A. Berlin, for Appellant, cited *Witlock v. McKechnie*, 1 Bosw. 427; *Cotes v. Campbell*, 3 Cal. 191; *Stearns v. Martin*, 4 Cal. 227; *Murdock v. Clarke*, 59 Cal. 683; *Carrier v. Cameron*, 31 Mich. 373.

A. C. Adams, for Respondent.

SHARPSTEIN, J. — The plaintiff alleges in his complaint that he leased certain premises for a specified period to one Ardrey for the sum of \$600, and that the defendant guaranteed the payment thereof. The complaint contains what is alleged to be a copy of the guaranty, and it is signed "L. Feldman & Co." Whether that, in connection with the allegations that the defendant, "at the time of said hiring and letting of said land and premises, then and there agreed in writing, to and with said plaintiff, to guarantee to him, said plaintiff, the payment of said \$600," and that "the said guaranty of said defendant for the payment of said \$600 rent was then and there written and duly signed by said defendant," is sufficient to render the defendant *individually* liable for said rent, is the principal, if not the only question which we have to consider on this appeal.

Does it sufficiently appear by the allegations of the complaint that the defendant was the guarantor? If so, the demurrer was properly overruled; otherwise, it should have been sustained. The complaint does not show that there was not such a firm as "L. Feldman & Co.," or that the defendant was not authorized to write and sign said guaranty for said firm; or that the defendant did business in the name of "L. Feldman & Co." Consistently with the allegations of the complaint there might have been such a firm, and the defendant might have been authorized to write and sign for it the guaranty sued on in this action. If a copy of the guaranty had not been incorporated in the complaint, it would sufficiently appear that the defendant was the guarantor. But the written guaranty does not purport to be his, but that of "L. Feldman & Co." If the copy had been omitted, and the allegations of the complaint denied, could the plaintiff have introduced that guaranty in evidence? We think not. And if not, it is quite clear that the complaint does not state facts sufficient to constitute a cause of action. In other respects we think the complaint sufficient.

Judgment reversed, with directions to the court below to sustain the demurrer, with leave to the plaintiff to amend within ten days after being notified thereof.

THORNTON, J., and MYRICK, J., concurred.

Hearing in Bank denied.

[No. 20082. Department Two.—June 2, 1885.]

EX PARTE E. WHITE ON HABEAS CORPUS.

CONSTITUTIONAL LAW—LAUNDRY ORDINANCE.—Order No. 1559 of the board of supervisors of the city and county of San Francisco, prescribing the manner in which buildings used as laundries shall be constructed, is not unconstitutional, and has not been repealed.

APPLICATION for a writ of habeas corpus. The petitioner was arrested and held in custody under order No. 1559 of the board of supervisors of the city and county of San Francisco. The remaining facts sufficiently appear in the opinion of the court.

A. C. Searle, for Petitioner.

Alfred Clarke, for Respondent, cited Stats. 1861, p. 544; Stats. 1863, p. 540; Stats. 1871–72, p. 736; Const. Cal., art. xi., § 11; *Ex parte Shrader*, 33 Cal. 279; *Ex parte Keating*, 38 Cal. 702; *Ex parte Delaney*, 43 Cal. 478; *Ex parte Ah Toy*, 57 Cal. 92; *Ex parte Casinello*, 62 Cal. 538; *Ex parte Ah Sing*, 59 Cal. 404; *Ex parte Chin Yan*, 60 Cal. 78; *Los Angeles v. S. P. R. R. Co.*, 61 Cal. 59; *Ex parte Stuart*, 61 Cal. 374; *Ex parte Benninger*, 64 Cal. 291; *Ex parte Moynier*, 65 Cal. 33; *Ex parte Wolters*, 65 Cal. 269; *Ex parte Mount*, 66 Cal. 448; *Barbier v. Connolly*, 113 U. S. 27.

SHARPSTEIN, J.—The petitioner bases his right to a discharge on two grounds, (1) the unconstitutionality of order 1559; and (2) that it was repealed by orders 1719 and 1767.

Order No. 1559 contains two sections:—

“Section 1. All buildings erected and used as laundries within the corporate limits of this city and county, on and after March 1, 1880, shall be constructed but one story in height, with brick or stone walls, not less than twelve inches in thickness, covered with a metal roof, and provided with metal or metal covered doors and window shutters.

“Section 2. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than \$1,000, or by imprisonment in the county jail not

more than six months, or by both such fine and imprisonment."

We do not doubt the constitutional power of the board of supervisors to pass such an order, or of the municipal authorities to enforce its observance. (Const., art. xi., § 11; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703.) Neither order 1719 nor 1767 is inconsistent with or repugnant to order 1559, nor is the object of either of the former the same as that of the latter. The object of the latter is to prohibit the use of buildings for laundry purposes which are not constructed of the materials and in the manner therein prescribed. Neither of the other orders contains any provision on that subject. Under such circumstances a repeal cannot be implied.

Writ dismissed and petitioner remanded.

THORNTON, J., and MYRICK, J., concurred.

[No. 20079. In Bank.—June 2, 1885.]

THE PEOPLE, APPELLANT, v. JOHN MURRAY ET AL.,
RESPONDENTS.

CRIMINAL LAW—ATTEMPT TO COMMIT BURGLARY—INFORMATION.—The crime of attempt to commit burglary is defined by statute, and an information which charges the offense in the language of the statute is sufficient.

APPEAL from an order of the Superior Court of the county of San Joaquin sustaining a demurrer to the information.

The facts sufficiently appear in the opinion of the court.

Attorney-General Marshall, for Appellant, cited *People v. Girr*, 53 Cal. 629.

J. H. & J. E. Budd, for Respondents.

The COURT. — The defendants were accused, by information, of the crime of attempt to commit burglary, a felony, committed as follows:—

"The said John Murray and James Cunningham . . . did wilfully, unlawfully, and feloniously attempt to wilfully, unlaw-

fully, and feloniously enter that certain room of," etc., "with the intent then and there, and therein, wilfully, unlawfully, and feloniously to commit larceny."

The information was demurred to on the ground that it did not comply with sections 950 and 951 of the Penal Code, the first of which sections declares that the information must contain a "statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended"; *second*, that the facts stated do not constitute an offense; and *third*, that the information does not state facts sufficient to constitute an offense. The demurrer was sustained.

According to Wharton (1 Crim. Law, §§ 190-192), the above statement of facts would not be sufficient according to the common-law rules; it was necessary to have stated the acts constituting the attempt. "But," says Wharton (§ 191, above), "where the legislature has by statute declared a particular act to be indictable, and provided that it shall be enough to describe such act in the statutory terms — when this is done by direction or implication — it is proper for the courts to hold, as has been done, that an indictment charging that the defendant did attempt to feloniously steal from the house of A. B., or to commit a rape on A. B., is good."

The statute of this State (Pen. Code, § 459) defines the crime of burglary, and section 664 declares that "every person who attempts to commit any crime," etc., is punishable, but does not declare what acts shall constitute an attempt. It has been frequently held by this court sufficient to state the offense charged in the language of the statute. Applying these rules to the information before us, it is sufficient.

The order is reversed and the cause is remanded to the Superior Court of San Joaquin County, with directions to overrule the demurrer.

[No. 9547. In Bank.—June 2, 1885.]

OSCAR PALMER, RESPONDENT, v. J. H. SNYDER,
ET AL., APPELLANTS.

SAN DIEGO—VIOLATION OF CITY ORDINANCE—ACTION TO RECOVER FINE.
—PLACE OF TRIAL.—An action commenced before a justice of the city of San Diego, under section 12 of the act re-incorporating such city, to recover a fine for a violation of a city ordinance, may be transferred for trial to a justice having his office outside the city.

APPEAL from a judgment of the Superior Court of San Diego County.

Proceedings for a writ of mandate to compel the defendants, as trustees of the city of San Diego, to audit a claim based upon a judgment recovered in the Superior Court of San Diego County. The action in which the judgment was recovered was begun by the city of San Diego against the petitioner to recover a fine for the violation of a city ordinance. It was brought before a justice having his office within the city limits, under the provisions of section 12 of the city charter, providing that all fines "may be recovered before any justice of the peace having his office within the corporate limits of the city." On motion of the petitioner, the action was transferred to a justice who had his office in National City, outside the corporate limits of San Diego. Judgment therein was rendered in favor of the petitioner, which was affirmed by the Superior Court. The further facts are stated in the opinion of the court.

E. W. Hendrick, for Appellants.

Works & Titus, and *Conklin & Hunsaker*, for Respondent.

The COURT. — 1. The appellant claims that the justice of the peace of National Township had no jurisdiction of the case, and that a judgment rendered by any justice having his office out of the city of San Diego, in a case under section 12 of the act to re-incorporate the city of San Diego, is void. (Stats. 1875-76, p. 812.) The act does not say that a judgment shall not be recovered before any justice out of the city. The action was properly brought before a justice of the city, and at the special instance and request of the city was transferred to a

justice of National Township in the same county. We think the latter justice had jurisdiction. There is nothing in the act referred to to show that sections 833 and 836 of the Code of Civil Procedure are not applicable to this case, as to change of place of trial.

2. We find nothing in the act which shows error in the order that the defendants, the board of trustees, audit and allow plaintiff's claim and issue warrant therefor.

Judgment affirmed.

[No. 9728. Department Two.—June 3, 1885.]

WALTER D. STEPHENSON, ADMINISTRATOR OF THE
ESTATE OF ELI W. HAWKINS, DECEASED, APPELLANT, *v.*
P. B. HAWKINS ET AL., RESPONDENTS.

CANCELLATION OF INSTRUMENT—WANT OF CONSIDERATION.—A written instrument will not be cancelled on the mere ground of want of consideration, where there is no evidence tending to prove that it was obtained by misrepresentation or executed by mistake.

ID.—EVIDENCE—DECLARATIONS OF DECEASED PERSON.—Declarations by the plaintiff's intestate, the maker of the instrument, after he had executed the same, *held*, inadmissible to prove such misrepresentation or mistake.

APPEAL from a judgment of the Superior Court of Ventura County, and from an order refusing a new trial.

The facts sufficiently appear in the opinion of the court.

W. P. Gardiner, Blackstock & Shepherd, and W. D. Gould,
for Appellant.

Albert M. Stephens, and Williams & Williams, for Respondents.

SHARPSTEIN, J. — The plaintiff as administrator of the estate of Eli W. Hawkins, deceased, alleges that he in his lifetime was induced to enter of record in due form the satisfaction of a mortgage executed by the defendants P. B. Hawkins and Arnold upon certain real estate, of which they were the owners, to secure the payment of their promissory note to said intestate, by the agreement of said mortgagors that defendant P. B. Hawkins

should convey his interest in said promissory note to defendant Arnold, and he to defendant Adaline Hawkins, and she to the defendants Edward Hawkins, Effie Hawkins, and Eli Hawkins, minor children of said intestate, to be held by them in trust for him. The several conveyances were made, but that from defendant Adaline to said minor children conveyed the property to them absolutely and not in trust for said intestate. And the conveyance from defendant Arnold to said defendant Adaline, who is and at the time of the execution of said deed was the wife of said defendant P. B. Hawkins, expresses on its face a consideration of one dollar.

It is alleged that the sole consideration for releasing the mortgage was the agreement of the defendants P. B. Hawkins and Arnold that the legal title to the property, by the circuitous method above stated, should be vested in intestate's said minor children, to be by them held in trust for him. And that said agreement was not carried out. Appellant's insistence is that the conveyance is in terms absolute; and does not convey any title whatever, because the conveyance from defendant Arnold to defendant Adaline, the grantor in said deed to said minors, expresses a valuable consideration, which, she being a married woman at the time, vested the title in the community. And it is alleged in the complaint that said defendants P. B. Hawkins and Arnold falsely and fraudulently represented to said intestate that the deed of said defendant Adaline to said minors conveyed a perfect legal title to them in trust for him, and that on the faith of that representation he released said mortgage. Therefore the plaintiff prays to have said release cancelled, and for a judgment of foreclosure of the mortgage.

The infant defendants by their guardian deny in their answer all the allegations upon which the plaintiff bases his claim to have the release of the mortgage cancelled. And after the plaintiff had introduced his evidence upon the issues so raised and rested, the court on motion of defendant granted a nonsuit. Plaintiff moved, on a statement, for a new trial, which was denied; and from that order this appeal is taken.

There is no evidence tending to prove that any misrepresentations were made to the intestate, or that he did not know the exact character and effect of the several deeds executed in con-

sideration of his releasing his mortgage on the premises. One witness who was present at the negotiation testified that the only consideration for the release of the mortgage was "the deed of Adaline Hawkins executed to the children."

Conceding that the evidence shows that no part of the sum claimed to be due on the mortgage was ever paid, we discover no evidence which would justify any court in finding that the release was obtained by misrepresentation, or executed by mistake. In the absence of any such evidence the release cannot be avoided on the simple ground of want of consideration. It does not appear that the consideration was not just what all the parties contemplated, and the evidence introduced by plaintiff tends to prove that it was.

Evidence of declarations made by intestate after he had executed the release was clearly inadmissible, and it was not error to strike it out after it had been erroneously admitted.

The objection to the introduction in evidence of the letter of defendant P. B. Hawkins, written long after the execution of the deeds, was properly sustained.

Judgment and order affirmed.

THORNTON, J., and MYRICK, J., concurred.

[No. 9572. Department Two.—June 3, 1885.]

MERCED COUNTY, APPELLANT, *v.* JAMES E. HICKS
ET AL., RESPONDENTS.

PRACTICE—APPEARANCE BY ONE OF SEVERAL DEFENDANTS.—In an action against several defendants, where the summons has not been served on any of them, an appearance by an attorney at the request of one of the defendants, although purporting to be on behalf of all, is not binding upon those who did not authorize the appearance.

APPEAL from an order of the Superior Court of Merced County setting aside a judgment as to certain defendants.

This was an action upon an official bond, in which the defendant Hicks was principal and the other defendants sureties. The remaining facts are stated in the opinion of the court.

Frank H. Farrar, Henry Edgerton, and F. M. Ostrander, for Appellant, cited *Suydam v. Pitcher*, 4 Cal. 280; *Holmes v. Rogers*, 13 Cal. 191; *Turner v. Caruthers*, 17 Cal. 432.

R. H. Ward, for Respondents.

SHARPSTEIN, J. — Summons was not served on any of the defendants in the above entitled action. At the request of one of them, Hicks, an attorney signed a demurrer which on its face purports to be the joint demurrer of all of them. The demurrer was overruled, no one appearing to sustain it, and a judgment oy default was entered against all of the defendants. The defendants other than Hicks moved to vacate the judgment on the grounds that none of them had been served with a summons or had appeared in the action. The motion was granted, and from the order granting it this appeal is taken. As before stated there was no service of summons on any of the defendants, and no appearance by any of the respondents in the action unless the demurrer which was filed by Hicks and signed at his sole request by an attorney, without any authority from respondents, constituted an appearance by them. We think there was no appearance by the respondents. "A defendant appears in an action when he answers, demurs, or gives written notice of his appearance, or when an attorney gives notice of appearance for him." (Code Civ. Proc. § 1014.) But a defendant cannot be said to demur unless he does so in person or by an attorney authorized to represent him.

As none of the facts stated in the affidavit on which the respondents gave notice their motion would be based were denied, we think the appellants were in no way prejudiced by the attorney who signed the demurrer being permitted to explain under oath how he came to sign it. The error, if it be one, could not as we view it affect the substantial rights of any of the parties, and therefore should be disregarded.

Order affirmed.

MYRICK, J., and THORNTON, J., concurred.

Hearing in Bank denied.

[No. 8933. Department Two.—June 3, 1885.]

THE CITY AND COUNTY OF SAN FRANCISCO, RE-
SPONDENT, v. JAMES MCGINN, APPELLANT.

TAXATION—IMPROVEMENTS ERECTED ON LANDS LEASED FROM MUNICIPALITY.—For the purpose of taxation, improvements erected by a lessee upon lands owned by and leased from a municipal corporation are regarded as the property of the lessee.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing a new trial.

W. C. & I. G. Burnett, for Appellant.

William Craig, and *John L. Love*, for Respondent, cited *Los Angeles v. Los Angeles City Water Works*, 49 Cal. 638; *People v. Morrison*, 22 Cal. 74.

MYRICK, J. — This is a tax suit, the defendant claiming that no taxes on the property can be recovered of him. The city and county of San Francisco, in 1875, under the Act of March 30, 1875, leased to defendant a portion of the school lot belonging to the city and county, located at the corner of Market and Fifth streets. The defendant took possession of the leased land, and made improvements and erected a substantial four-story frame building, with brick foundation, attached to the soil. For the fiscal year 1881–82 the building and improvements were assessed to defendant, and this suit is to recover the taxes. The defendant insists that he is not liable for the taxes, because, he says, *first*, the city and county owns the realty, the improvements and building are portion of the realty, and therefore not his property; and *second*, section 3887 of the Political Code, as in force at the date of the lease, declared that the “lessor of real estate is liable for the taxes thereon,” and the city and county, being liable, cannot recover of him.

It is not necessary to follow and answer in detail the various reasons given by defendant why he should not be held liable; it is sufficient to say that, for the purposes of revenue, the legislature of this State has observed a distinction between real estate and improvements, and that distinction has been recognized by this court.

Section 3607 of the Political Code, as in force in 1875, declared that property of municipal corporations was not subject to taxation. If, as contended, the building and improvements were portion of the realty and thus held exempt, the provision of the Constitution of 1863, as to uniformity of taxation, might be evaded.

We are of opinion that, for the purposes of revenue, the defendant was the owner of the property assessed, and that he is liable for the taxes.

Order affirmed.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 9893. Department Two.—June 3, 1885.]

D. J. HORSWELL ET AL., APPELLANTS, v. FRANCISCO
RUIZ ET AL., RESPONDENTS.

MINING CLAIM—OCCUPATION—SUBSEQUENT POSSESSION—RIGHT OF POSSESSION.—Prior occupation and working of the mineral lands of the United States, without complying with the requirements of any law, either federal, district, or local custom, does not give a right of possession as against one who afterwards peaceably locates a mining claim covering the same ground, and in all respect complies with the federal and district mining laws and regulations. From the time the second person has perfected his location, the prior occupant is a trespasser.

ID.—BOUNDARY LINES NEED NOT BE PARALLEL.—The provision of the statute of 1872, requiring the end lines of each mining claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The action was brought to recover the possession of a mining claim, and for an injunction to restrain the defendants from extracting and removing the ore therefrom. The plaintiffs based their rights of possession upon a location made on May 8, 1884. At that date the land in controversy was in the occupation of the defendants, who were engaged in working it. The further facts appear in the opinion of the court.

Howard & Roberts, for Appellants.

Occupation and labor alone create no right of possession in the mineral lands of the United States. (*Chapman v. Toy Long*, 4 Sawy. 28; *McCormick v. Varnes*, 2 Utah, 355; *Belk v. Meagher*, 104 U. S. 284; *Hopkins v. Noyes*, 4 Mont. 550.) The end lines of the claim need not be parallel. (*Eureka Case*, 4 Sawy. 319.)

Smith & Hupp, for Respondents.

SHARPSTEIN, J. — The instructions given at the request of the defendants in some instances contradict those which were given at the request of the plaintiffs. For example, one instruction, given at plaintiffs' request, reads: "You are instructed that if a party goes upon the mineral lands of the United States and works thereon, without complying with the requirements of any law, either federal, district, or local customs, and relies exclusively on his possession or work, and a second party locates peaceably a mining claim covering the same ground, and in all respects complies with the requirements of the federal and district mining rules, laws, and regulations, then such second party is entitled to the possession of such mineral ground as against the party in prior possession, who is, from the time said second party has perfected his location and complied with the law, a transgressor."

At the request of defendants the following was given: "The jury are instructed that, independently of any mining laws or customs, a party who first takes possession of an unclaimed mineral lode for mining purposes, may hold the same by actual work and occupation, to the extent of such work and occupation, as against all the world, except the paramount proprietor, provided that he neither claims nor holds in excess of that to which he would be entitled by virtue of a compliance with the mining laws."

The law is correctly stated in the one first given. *Morenhaut v. Wilson*, 52 Cal. 263; *Chapman v. Toy Long*, 4 Sawy. 28; *McCormick v. Varnes*, 2 Utah, 355; *Belk v. Meager*, 104 U. S. 284; *Hopkins v. Noyes*, 4 Mont. 550.

In the *Eureka Case*, 4 Sawy. 302, the court, Field, J., delivering the opinion, said: "The provision of the statutes of

1872, requiring the lines of each claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction."

The court was requested by plaintiffs to so instruct the jury, and refused to do so. We think the instruction should have been given.

The other exceptions are overruled. Judgment and order reversed.

THORNTON, J., and MYRICK, J., concurred.

[No. 20054. Department Two.—June 4, 1885.]

THE PEOPLE, RESPONDENT, v. JOHN LENNOX,
APPELLANT.

CRIMINAL LAW—PLEA OF GUILTY—WITHDRAWAL OF PLEA AFTER PUNISHMENT HAS BEEN FIXED.—In a prosecution for murder, the defendant, with the concurrence of his attorney and other persons of whom he sought advice, pleaded guilty. The court, after hearing evidence, determined the degree of the crime, and fixed the punishment at death. *Held*, that the defendant could not afterwards withdraw his plea and plead not guilty.

ID.—WAIVER OF RIGHT TO JURY TRIAL.—In a criminal prosecution, a defendant, by pleading guilty, waives his right to a trial by jury.

APPEAL from a judgment and certain orders of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

John F. Godfrey, for Appellant.

Attorney-General Marshall, for Respondent.

MYRICK, J. — The defendant was accused by information of the crime of murder. He was arraigned and pleaded not guilty, and the cause was set for trial. On the day set, September 4, 1884, the defendant by his counsel moved the court for leave to withdraw his plea of not guilty, and offered to plead *nolo contendere*. The motion was objected to by the district attorney, and was denied by the court. The defendant then asked leave to withdraw his plea of not guilty, which motion

was granted. The defendant then pleaded guilty. Thereupon the court proceeded to hear evidence for the purpose of fixing the degree of the crime. Witnesses were examined, as well those offered by the defendant as for the prosecution — some thirty in all. After hearing the evidence, the court fixed the degree of the crime to be murder in the first degree, and set September 11, 1884, as the day on which the punishment should be determined. On that day, the court, referring to section 190 of the Penal Code, and to the testimony which had been taken, declared to the defendant that the discretion to be exercised by the court, as to whether the punishment should be death or imprisonment for life, was the same as that to be exercised by a jury determining the same question, and that, "from the evidence in this case I can find no circumstances of mitigation, but many of aggravation; the fact that your passions were inflamed with strong drink can furnish no extenuation. I must therefore adjudge that you be taken hence by the sheriff of this county to its county jail, where you will be by him retained until at a time and place to be hereafter determined by the court you will be hanged by the neck until you are dead."

Thereupon, and before the clerk had entered the judgment in the record, the defendant's attorney moved the court to permit the defendant to withdraw the plea of guilty, and to plead not guilty, on the ground that the defendant had been misled in withdrawing his plea of not guilty, and pleading guilty. The reasons given in the record why the defendant deemed himself misled in pleading guilty were because his father, a deputy sheriff, and his attorney, expressed to him the belief that if he pleaded not guilty and was tried by a jury, the jury would find him guilty, and affix the death penalty; whereas, if he pleaded guilty, they believed the court might, in the exercise of its judgment, fix the punishment at imprisonment for life.

We see no error. The defendant, with his own knowledge of what he had done, with the concurrence of his attorney and such others as he sought advice of, pleaded guilty to the charge; the court, in compliance with section 1192 of the Penal Code, determined the degree, and, after hearing evidence, determined, in compliance with section 190 of the Penal Code, the punishment. All the proceedings seem to have been according to law.

Not until after the court had performed its duty of fixing the punishment did the defendant express any desire to reconsider his plea of guilty.

The point that the defendant could not, by pleading guilty, waive a trial by jury, is answered adversely to him by the decision in *People v. Noll*, 20 Cal. 164.

The judgment and the orders appealed from are affirmed, and the cause is remanded to the Superior Court of Los Angeles County, with directions to proceed according to law in carrying the sentence into execution.

SHARPSTEIN, J., and THORNTON, J., concurred.

[No. 11031. Department Two.—June 4, 1885.]

TOWNSEND WOOD ET AL., PETITIONERS, v. THE SUPERIOR COURT OF MONTEREY COUNTY, RESPONDENT.

APPEAL FROM JUSTICE'S COURT—UNDERTAKING—JUSTIFICATION OF SURETIES.—Where the sufficiency of the sureties upon an undertaking on appeal from a Justice's Court is excepted to, the appeal cannot be perfected by filing a new undertaking without notice to the adverse party.

APPLICATION for a writ of review. The facts are stated in the opinion of the court.

Geil & Morehouse, for Petitioners.

Wm. H. Webb, for Respondent.

The COURT. — *Certiorari*. In perfecting his appeal from the Justice's Court to the Superior Court, the appellant gave an undertaking. The adverse party excepted to the sufficiency of the sureties. Neither the sureties in the undertaking nor other sureties justified; but, instead thereof, the appellant filed a new undertaking with other sureties. In so doing he gave no notice as required by the last clause of section 978 of the Code of Civil Procedure. Such being the case, "the appeal must be regarded as if no such undertaking had been given." The statute is

peremptory. Without the justification of the sureties named in the undertaking, or other sureties in their stead, *upon notice to the adverse party*, the appeal was not perfected, and the Superior Court has no jurisdiction of the case. The motion to dismiss the appeal should have been granted.

The proceedings in the Superior Court are annulled.

[No. 9947. In Bank.—June 6, 1885.]

A. M. ROSBOROUGH, PETITIONER, v. CHARLES T. BOARDMAN, COUNTY AUDITOR, ETC., RESPONDENT.

COUNTY ASSESSOR OF ALAMEDA COUNTY—ACT OF FEBRUARY 10, 1874. ABOLISHING.—The Act of February 10, 1874, abolishing the office of county assessor of Alameda County, and creating the office of township assessor, is constitutional. Such act was not repealed by the Act of March 7, 1881, amending section 4109 of the Political Code.

ID.—COUNTY GOVERNMENT ACT.—After the passage of the Act of January 10, 1874, and until the first Monday after the 1st day of January, 1885, the date on which the provisions of the County Government Act of March 14, 1883, creating county offices, took effect, there was no such office as county assessor of Alameda County.

PUBLIC OFFICE—VACANCY IN, HOW CREATED.—A public office does not become vacant except upon the happening of one of the events enumerated in section 996 of the Political Code.

APPLICATION for a writ of mandate to compel the respondent, as county auditor of Alameda County, to draw his warrant in payment of the petitioner's salary as county assessor for the month ending on the first Monday in February, 1885. Neither at the general election held in 1882, nor subsequent thereto, had any person been elected or appointed to the office of county assessor of Alameda County, until on December 15, 1884, the board of supervisors appointed the petitioner to fill the vacancy supposed to exist in such office. The further facts are stated in the opinion of the court.

R. A. Redman, for Petitioner.

S. P. Hall, District Attorney, Wm. R. Davis, and E. C. Robinson, for Respondent.

SHARPSTEIN, J. — If there was not, immediately preceding the date of the passage of the act to "establish a uniform system

of county and township governments" (approved March 14, 1883), any such office as that of "county assessor of Alameda County," there is not any such office now, unless it was created by some provision of that act; and if such an office was created by any provision of that act, such provision did not take effect prior to the first Monday after the 1st day of January, 1885, as clearly appears by section 181:—

"Any provision of this act creating a county office in any county shall not (except for election purposes) take effect prior to the first Monday after the first day of January, eighteen hundred and eighty-five." (St. and Amdts. to Codes, 1883, p. 365.)

The petitioner's alleged appointment was made prior to the 1st day of January, 1885, and before any provision of the Act of March 14, 1883, "creating a county office," in Alameda County, had taken effect. Petitioner, however, insists that the Act of February 10, 1874, which abolished the office of county assessor of Alameda County and created township assessors, was repealed by an amendment to the Political Code. But this amendment, although passed subsequently to the Act of February 10, 1874, became a part of the Political Code which went into effect prior to the passage of said act. As originally adopted, the Code denominated and enumerated the officers of a county. (Pol. Code, § 4103.)

By the subsequent Act of February 10, 1874, the provision of that Code, making "an assessor" a county officer of Alameda County, was repealed. The amendment of the Code which took effect March 7, 1881, does not expressly repeal, nor is it repugnant to any of the provisions of the Act of February 10, 1874. It simply fixes the time of the election of the several officers enumerated in it. (Pol. Code, § 4109.) But for the Act of February 10, 1874, this amendment would have applied to Alameda County as fully as to any other. After the passage of the Act of February 10, 1874, Alameda County was as clearly excepted from the operation of the original Code, so far as it related to the office of county assessor, as if the exception had been made in that Code. And if it had been, we think no one would seriously contend that the exception was repealed or in any way affected by the amendment of March 7, 1881. The

amendment does not create any offices. It simply provides when elections shall be held for filling those already created. It must be read in connection with the other provisions of the Code in which it is incorporated. And being so read it cannot be held to repeal by implication an act which was passed after the adoption of the Code, and which in no way relates to the subject to which the amendment relates, viz., the time of electing county officers.

There is another ground on which we think this application must be denied. The power of the supervisors to appoint petitioner depended on there being a vacancy in the office; and an office becomes vacant on the happening of any of the events enumerated in section 996 of the Political Code, among which the event relied on in this case is not mentioned. The enumeration in the Code must be held to be exclusive. (*People v. Tilton*, 37 Cal. 621; *Stratton v. Oulton*, 28 Cal. 51; *People v. Bissell*, 49 Cal. 411.)

In *Mitchell v. Crosby*, 46 Cal. 97, this court said: "When the Code mentions assessors it must be construed as meaning district assessors as well as county assessors, so long as the present district assessors remain in office," which would be until the happening of one of the events enumerated in section 996 of the Political Code, or the election and qualification of their successors. (Pol. Code, § 876.)

Thus far we have assumed that the Act of February 10, 1874, was constitutional. Counsel for petitioner insists that it was not. It was passed while the late Constitution was in force, and if during that period, it or a similar act was held to be constitutional, the question must now be regarded as settled. In *People v. Central P. R. Co.* 43 Cal. 398, the constitutionality of an act which provided for the election of district assessors for Placer County was attacked on the same grounds that the constitutionality of the act under which township assessors for Alameda County were elected is now attacked, and was held to be constitutional. In *People v. Placerville & S. P. V. R. Co.* 34 Cal. 656, it was held that in El Dorado County, which was divided into revenue districts corresponding to the several townships, the authority of each assessor was limited to the district within and for which he was elected; implying that within their respective

districts they had the power to assess property. These cases are in our opinion decisive of the question.

As the right of the petitioner depends, (1) on there being such an office as that which he claims to have been appointed to fill, at the date of his alleged appointment; and (2) on there being a vacancy in the office at that date, it follows from the foregoing that his application for a writ to compel the respondent to draw his warrant on the treasurer for the payment of his (petitioner's) salary as "county assessor" must be denied.

Application denied.

MORRISON, C. J., MYRICK, J., ROSS, J., and MCKINSTRY, J., concurred.

THORNTON, J., concurring. — I concur in the judgment in this cause, and in the opinion except as to that portion which relates to vacancies in office and the effect attributed to section 996 of the Political Code. I am of opinion that an office is vacant which has never had an incumbent legally elected or appointed; and becomes vacant where the term fixed by law of the incumbent thus legally elected or appointed has expired, though he may hold over until his successor is elected or appointed and has qualified. If this is not so, the term of certain officers is extended by an act of the legislature (§ 996, Pol. Code) in direct violation of the last clause in section 9, article xi., of the Constitution. There may be other cases where an office becomes vacant in the sense of the words "becomes vacant" employed in article v., section 8, of the Constitution, not mentioned above or defined in section 996. The question discussed in the portion of the opinion to which I cannot give my assent, does not arise in the case, for when it is said, as it is in the opinion, that "the petitioner's alleged appointment was made prior to the 1st day of January, 1885, and before any provision of the Act of March 14, 1883, creating a county office in Alameda County, had taken effect," the question as to vacancy is determined, and that by holding that there was no vacancy at that time.

[No. 9895. Department Two.—June 10, 1885.]

I. A. MCCRARY, RESPONDENT, v. V. BEAUDRY,
APPELLANT.

WATER—SALE AND DISTRIBUTION—PUBLIC USE—FRANCHISE.—A person engaged in furnishing water to the inhabitants of a city under a franchise permitting him to lay pipes through the streets for that purpose and to sell the water, cannot without reasonable cause shut off the water from one of such inhabitants who is using the same at a fixed rate. The use of water appropriated for sale, rental, or distribution is a public use, and the right to collect rates or compensation for the use of water furnished to the inhabitants of a city is a franchise which can only be exercised by authority of and in the manner prescribed by law.

MANDAMUS—AFFIDAVIT—DEMURRER.—The affidavit upon which a writ of mandate is issued may be treated as a complaint, and demurred to accordingly, but it is not necessary that the affidavit should contain the title of the action or proceeding in which it is made.

ID.—The affidavit in this case examined, and *held* to be sufficient.

APPEAL from a judgment of the Superior Court of Los Angeles County.

The facts are stated in the opinion of the court.

J. F. Godfrey, for Appellant.

The affidavit was properly demurred to. (*People v. Lake County*, 33 Cal. 492; *Knox v. Los Angeles County*, 58 Cal. 59.) The defendant was not bound to supply the plaintiff with water. (*Dillon on Municipal Corp.* §§ 549, 551; *Patterson Gas Light Co. v. Brady*, 3 Dutch. 245.)

Wells, Van Dyke & Lee, for Respondent.

The affidavit need not contain the title of the action. (High on Extraordinary Remedies, § 509, and cases there cited.) The use of the water is a public use. (*People v. Stephens*, 62 Cal. 209; *Munn v. Illinois*, 94 U. S. 126.)

SHARPSTEIN, J. — This is an appeal from a judgment that a writ of mandate issue as prayed in the affidavit of plaintiff.

The affidavit was properly treated as a complaint, which was demurred to by defendant on several grounds, the principal one of which is that it did not state facts sufficient to constitute a cause of action. The complaint shows with reasonable certainty that the defendant obtained from the city of Los Angeles per-

mission to lay water-pipes in the streets of said city for the conveyance of water for his use and that of the citizens residing in what is known as "the hilly section" of said city, "to whom he might sell or give water." That after obtaining such permission the defendant laid pipes in said streets and through them conducted water to said section, which he sold to the residents of said section, of whom the plaintiff was one, at certain monthly rates, which the plaintiff paid until November, 1884, when the defendant, without any valid excuse for so doing, shut the water off from the plaintiff's premises and refused to turn it on again. Appellant insists that the facts alleged are not sufficient to impose on him any duty or obligation to furnish the respondent with water.

It appears sufficiently clear that appellant had appropriated water for distribution and sale, and that he had acquired and was exercising the right to collect rates from the inhabitants of the city of Los Angeles for the use of it; and the use of all water appropriated for sale, rental, or distribution is declared by the Constitution to be a public use; and the right to collect rates or compensation for the use of water to the inhabitants of any city is a franchise which cannot be exercised except by authority of and in the manner prescribed by law. (Const. art. xiv.) Whenever water is appropriated for distribution and sale, the public has a right to use it. That is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner. Water appropriated for distribution and sale is *ipso facto* devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he had never so appropriated it.

In one part of the affidavit it is stated that affiant "has been paying the said Beaudry for said water at the regular rates established and demanded of affiant by said Beaudry," and in another "that affiant has been paying said V. Beaudry for water for use on said premises for domestic and irrigating purposes during the eight months last past at the rate of \$2.25 per month; and affiant alleges that he has been at all times, and is now, ready and willing to pay to said V. Beaudry the sum of money fixed as the established rate for use of water on said premises,

which he alleges was, and is now, the sum tendered as aforesaid, to wit, the sum of \$2.25 per month, and that no greater sum has been, nor is now, demanded by said Beaudry for the use of water on said premises for domestic use and irrigating purposes."

Reading the two paragraphs together it appears that the rate established by appellant for supplying respondent with water was \$2.25 per month, which he paid as long as he was supplied with water, and has at all times since been ready and willing to pay.

The facts alleged in the complaint show to our satisfaction that the appellant was in the exercise of a franchise which he could not exercise except by authority of and in the manner prescribed by law, and that the law enjoined on him the duty, resulting from that trust, of furnishing respondent with water.

The writ was issued according to the requirement of the Code upon the affidavit of respondent, the party beneficially interested, and such affidavit was as valid and effectual without the title of the action or proceeding in which it was made, "*for any purpose as if duly entitled.*" (Code Civ. Proc. § 1046.)

The affidavit, in a case like this, may be treated as a complaint, and still remain an affidavit, to all intents and purposes.

We think the demurrer was properly overruled.

Judgment affirmed.

MYRICK, J., and THORNTON, J., concurred.

[No. 8576. Department Two.—June 22, 1885.]

T. H. HATCH ET AL., RESPONDENTS, v. NEW ZEALAND INSURANCE COMPANY, APPELLANT.

INSURANCE POLICY—CONSTRUCTION—FALSE DESCRIPTION.—In a policy of fire insurance, a portion of the description which is false will be disregarded, where enough remains to identify the property.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

W. S. Goodfellow, for Appellant, cited *Bryce v. Lorillard Ins. Co.* 55 N. Y. 240, 245, 246; *Thomas v. Thomas*, 6 Durn & E. 676.

I. R. Brandon, for Respondents, cited *W. F. Mutual Ins. Co. v. Miller*, 1 Handy, 325; *Aurora Fire Ins. Co. v. Eddy*, 49 Ill. 106; *Wells, Fargo & Co. v. Pacific Ins. Co.* 44 Cal. 397; *Heath v. Franklin Ins. Co.* 1 Cush. 257; *Vance v. Fore*, 24 Cal. 445.

THORNTON, J. — The defendant insured the property of the plaintiff in the Overland Free Warehouse, situate at the northeast corner of Third and King streets, San Francisco. It makes no difference that this building was styled in the policy Overland Free Warehouse No. 1. As it was actually Overland Free Warehouse No. 2, instead of No. 1, the part of the description No. 1 in the policy should be rejected as false. No. 2 was the warehouse at the corner, while No. 1 was forty-six feet distant from it. If the property intended to be conveyed is described in a deed as Overland Free Warehouse No. 1, situate on the northeast corner of Third and King streets, San Francisco, upon proof that a warehouse of that name was situate at the northeast corner of the streets named, such warehouse would be held to pass to the grantee, though described as No. 1, when it was really No. 2.

It appearing by the proof of the actual condition of the property that the description No. 1 was false, and that the remaining description of the property sufficiently identified it, the false part should be rejected. We know no reason why this rule does not apply to a description of property in a policy of insurance, as well as to a description of property in a conveyance.

The findings sufficiently identify the warehouse in which the property insured was stored.

There is no error, and the judgment and order are affirmed. Ordered accordingly.

SHARPSTEIN, J., and MYRICK, J., concurred.

Hearing in Bank denied.

[No. 8526. Department Two.—June 22, 1885.]

PHILIP GEROLD, APPELLANT, v. THE J. M. BRUNSWICK
& BALKE COMPANY, RESPONDENT.

NEW TRIAL—INSUFFICIENCY OF EVIDENCE—VERDICT—APPEAL—DISCRETION.—A motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court, and an order granting a new trial on that ground will not be reversed on appeal unless a manifest abuse of discretion appears.

APPEAL from an order of the Superior Court of the city and county of San Francisco granting a new trial.

The action was brought to recover damages for the breach of a contract to employ the plaintiff as a commercial traveler. A trial by jury was had and a verdict rendered for the plaintiff. The further facts are stated in the opinion of the court.

T. J. Crowley, and *R. Percy Wright*, for Appellant.

J. E. McElrath, and *J. M. Rothschild*, for Respondent.

THORNTON, J. — The specifications of the particulars in which the evidence was insufficient to justify the verdict are sufficient.

This appeal is from an order granting a new trial on motion of the defendant. The only ground on which the court below could have granted it was the insufficiency of the evidence to justify the verdict; and it has been uniformly held by this court that a motion for a new trial on this ground is addressed to the sound legal discretion of the court, and that on appeal from an order of the trial court granting such new trial, this court will not reverse the order, unless it appears that there has been a manifest abuse of such discretion. (*Hall v. Bark Emily*, 33 Cal. 522; *Phelps v. Union C. M. Co.* 39 Cal. 410; *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, 55 Cal. 419.) We find no abuse of discretion here, though the evidence is conflicting. (*Oullahan v. Starbuck*, 21 Cal. 413; *Dickey v. Davis*, 39 Cal. 565.)

Order affirmed.

SHARPSTEIN, J., and MYRICK, J., concurred.

Hearing in Bank denied.

[No. 9744. Department One.—June 23, 1885.]WILLIAM H. CHENEY, APPELLANT, v. J. R. NEWBERRY
& CO., RESPONDENTS.

LEASE—CONTRACT FOR—PAYMENT OF RENT—CANCELLATION.—An entry under a written contract for a lease for a stated term, and at a specified rent, and the payment and receipt of the rent, constitute a valid lease between the parties for the term and at the rental specified. Neither party can subsequently cancel the contract without the consent of the other.

APPEAL from a judgment of the Superior Court of San Bernardino County.

Action for unlawful detainer. The complaint, in addition to the averments mentioned in the opinion, alleged that on the 24th day of April, 1884, the plaintiff notified the defendants, that if they continued to occupy the leased premises after the 1st day of June, 1884, the rent would be raised to \$100 per month; that the defendants did so continue in occupation for several months, and refused, after a three-days demand so to do, either to pay the increased rent or surrender possession of the premises. The demurrer of the defendants to the complaint was sustained, and upon the refusal of the plaintiff to amend, judgment was entered thereon. The further facts are stated in the opinion of the court.

Henry M. Willis, for Appellant.

Satterwhite & Curtis, for Respondents.

Ross, J. — The demurrer to the complaint was properly sustained. The complaint alleges that on the 1st of June, 1883, under a written contract for a lease of a certain lot of land for the term of three years, at a rental of \$66.66 per month, payable in advance, the defendants entered into possession of the premises. That on the 27th of September, 1883, being still in possession, defendants notified plaintiff "that they rescinded and cancelled the contract for a lease aforesaid and refused to be bound by it." That defendants continued to occupy the premises, "and plaintiff elected to receive from them for the year ending June 1, 1884, the rent therefor at the rate of \$66.66 per month." Unless, in this condition of affairs, it can be said that

defendants were not holding the premises under the contract under which they originally entered, it is quite clear that the action, which is unlawful detainer, cannot be maintained upon the averments contained in the complaint. The entry under the written contract for a lease for a stated term and at a stated rent, and the payment and receipt of the rent, constituted a valid lease between the parties for the term and at the rental specified. (1 Wash. Real. Prop. pp. 397, 398.) Neither party could subsequently cancel the contract without the consent of the other, and that the plaintiff did not consent to the proposed cancellation is manifest from his subsequent acceptance of the rent in accordance with the terms of the contract. Payment and receipt of the rent was only consistent with a recognition by lessor as well as lessee that the lease was in force.

Judgment affirmed.

McKEE, J., and MCKINSTRY, J., concurred.

[No. 9752. Department One.—June 23, 1885.]

WILLIAM H. CHENEY, RESPONDENT, v. J. R. NEWBERRY
& CO., APPELLANTS.

PARTNERSHIP—BUSINESS DONE UNDER FICTITIOUS NAME—ASSIGNMENT OF PARTNERSHIP CLAIM.—Section 2468 of the Civil Code, requiring partners doing business under a fictitious name to file and publish a certificate of copartnership before they can maintain an action on a partnership demand, does not prevent the assignment by them of a valid partnership claim, although they have not filed or published the required certificate.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The action was brought to recover on a partnership claim originally in favor of Wm. H. Cheney & Co., and by them assigned to the plaintiff. Cheney & Co. had never filed or published the certificate required by section 2468 of the Civil Code. The defendants requested the court to instruct the jury that if they believed the assignment was made for the purpose of evading the requirements of section 2468, the plaintiff could not

maintain the action. The court refused so to instruct, to which ruling the defendants excepted.

Satterwhite & Curtis, for Appellants.

Henry M. Willis, for Respondent.

ROSS, J.—Appellants contend that the provision of the Civil Code to the effect that persons doing business as partners, contrary to the provisions of the article requiring the filing and publishing of a certificate showing the names and residence of all of the members of the partnership, “shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name,” also preclude such persons from assigning a valid claim held by them as partners. There is nothing in the point.

Judgment affirmed with ten per cent damages.

MCKINSTRY, J., and MCKEE, J., concurred.

[No. 8913. Department One.—June 23, 1885.]

CHARLES MAIN, RESPONDENT, v. EUGENE CASSERLY
ET AL., APPELLANTS.

CORPORATION—PROMISSORY NOTE—ULTRA VIRES.—A corporation is liable on its promissory note, the consideration of which it has received and retained, although the note was executed in pursuance of a contract *ultra vires*.

PROMISSORY NOTE—INTEREST UPON DEFAULT—HOW COMPUTED.—Where a promissory note provides that in case of non-payment at maturity it shall bear interest at a certain rate until paid, interest should be computed upon it from its date and not from the time of default.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

W. S. Goodfellow, for Appellants.

J. Howard Smith, for Respondent.

MCKEE, J. — This is an action against the stockholder of a corporation, organized under the laws of the State, by the name of the "Lassen County Land and Flume Company," to recover judgment upon a promissory note in words and figures following:—

"\$8,250.00.

SAN FRANCISCO, July 25, 1877.

"Twelve months after date, for value received, the Lassen County Land and Flume Company promised to pay to the order of Henry Toomy eight thousand two hundred and fifty (8,250) dollars, in United States gold coin, without interest. In case of non-payment at maturity this note shall bear interest at ten per cent per annum until paid.

"(Signed)

EUGENE CASSERLY, President, etc.

"F. R. BUNKER, Secretary."

[CORPORATE SEAL.]

The payee of the note was a stockholder of the corporation and owner of 5,500 shares of its stock. At the same time he was largely indebted to the corporation; and he proposed, if the company would buy his stock at a stipulated price and give him its promissory note to secure payment of the same, that he would negotiate a sale of the note, and apply the moneys which he received for it in payment of his debt to the corporation. The company agreed, purchased the stock by the formalities required by law, and executed and delivered to him the note in suit, which he sold, indorsed, and delivered to the plaintiff before maturity, and out of the moneys received in the transaction he paid into the treasury of the corporation several thousand dollars in satisfaction and discharge of his indebtedness to the corporation.

By the executed agreement the company has therefore received 5,500 shares of stock and several thousand dollars, which it proposes to keep and repudiate its promissory note, upon the ground that the transaction was *ultra vires* and void.

Assuming that the contract of purchase was *ultra vires*, the law does not allow a corporation to retain the benefits which it has received from the contract and escape liability upon it. "The invalidity of a contract," says Mr. Sedgwick in his work on Statutory and Constitutional Law, p. 73, "is subject to the equitable exception that, although a corporation in making a contract acts in disagreement with its charter, where it is a

simple question of capacity, or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity. It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains."

The exception referred to is founded upon the fact that the contract, though invalid, has been executed in the interests of the corporation and for its benefit and advantage. Where, therefore, it has received the fruits of such a contract, it cannot refuse payment on the ground that it had no power to contract. It would be otherwise if the contract had not been executed.

The law of the subject is thus expressed in *Bradley v. Bradley*, 53 Ill. 413: "While a contract remains executory the powers of corporations cannot be extended beyond their charter limits for the purpose of enforcing it. Not only so, but on the application of a stockholder or of any other person authorized to make the application, a court of chancery would interfere and forbid the execution of a contract *ultra vires*. . . . But if one of the contracting parties proceeds in the performance of the contract, expending his money and his labor in the production of value, which the corporation appropriates, we can never hold the corporation excused from payment on the plea that the contract was beyond its power.

"In cases of such a character courts simply say to corporations, you cannot, in this case, raise the question of your power to make the contract. It is sufficient that you have made it, and by so doing, have placed in your corporate treasury the fruits of others' labors, and every principle of justice forbids that you be permitted to evade payment by an appeal to the limitations of your charter."

Upon this principle rest the cases of *Pixley v. W. P. R. R. Co.* 33 Cal. 198, and *Foulke v. San Diego S. P. R. R. Co.* 51 Cal. 365, decided by this court.

The parties contracted that in case of non-payment at maturity, the note should bear interest until paid; and there was no error in computing interest upon it from its date and not from

the time of default. (*Hackenbury v. Shaw*, 11 Ind. 392; *Parvin v. Hoopes*, 1 Morris, 294.)

We find no prejudicial error in the record.

Judgment affirmed.

MCKINSTRY, J., and ROSS, J., concurred.

[No. 8718. Department One.—June 23, 1885.]

N. MARINI, RESPONDENT, v. ROBERT GRAHAM, SUPERINTENDENT OF PUBLIC STREETS, ETC., APPELLANT.

PUBLIC NUISANCE—OBSTRUCTING SIDEWALK—STREET.—The sidewalks of a public street of a city are parts of the street, and the obstruction thereof is a public nuisance.

ID.—ABATEMENT OF NUISANCE—ACTION BY INDIVIDUAL—SPECIAL DAMAGE.—A private individual cannot maintain an action to abate such a nuisance when the injury which he suffers is the same in kind as that sustained by the public, although it may be greater in degree.

ID.—LEGALIZED OBSTRUCTION.—A legalized obstruction in the sidewalks of a street is not a nuisance.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

John T. Humphreys, W. C. Burnett, and Isaac G. Burnett, for Appellant.

The respondent has no special interest giving him a right to the writ of mandate. He is not the party beneficially interested, nor has he any right, not common to all the people of the State, from the enjoyment of which he is precluded by the appellant. His only injury is an inconvenience, greater in degree, but not different in kind from that sustained by the public. (Code Civ. Proc. §§ 367, 1085, 1086; *Wood on Nuisance*, 655; *Hopkins v. W. P. R. R. Co.* 50 Cal. 194; *Bigley v. Nunan*, 53 Cal. 403; *Payne v. McKinley*, 54 Cal. 532; *Moses on Mandamus*, 194.)

A. D. Splivalo, and William H. Mott, for Respondent.

McKEE, J. — This is an application for a writ of mandate.

It appears from the record in the case that section 7 of order No. 1588, of the general orders of the board of supervisors of the city and county of San Francisco, provides:—

“No person owning or having the control of any building, shall maintain any approach or entrance thereto from the sidewalk except in accordance with the following provision:—

“1. No entrance which shall be a descent from the sidewalk shall occupy more than three tenths of the width of the sidewalk nor more than four feet thereof. . . .

“2. No approach to a building which shall be an ascent from the sidewalk shall occupy more than three tenths of the width of the sidewalk nor more than four feet thereof, nor be more than five feet in height, and shall be protected by ballusters and railings, built to the satisfaction of the superintendent of public streets, highways, and squares.”

Dupont Street, between Union and Filbert streets, in said city and county, has a sidewalk ten feet wide. Ascending from the sidewalk to a building, Nos. 1505 and 1507, fronting on the street, there is an approach and entrance consisting of a flight of steps seven feet and eight inches high, which occupies three feet and five inches of the sidewalk. This approach having been, as alleged, maintained by the owner of the building in violation of the ordinance, demand was made upon the superintendent of public streets and highways of the city and county to “cause and compel the said approach to be maintained and constructed in accordance with the provisions of the ordinance.” This he refused to do; and, it is alleged, “his refusals have annoyed and greatly injured the petitioner,” who is the owner of adjacent buildings on the same street, “and other property owners in the neighborhood.” For that reason, and “because the matters involved are of public and general interest to the people of the said county, and more particularly to your affiant, who is beneficially interested herein,” and “because the maintenance and continuance of the approach heretofore complained of, and in violation of law, will work serious mischief and irreparable injury to affiant,” he asks for a peremptory writ of mandate to compel the superintendent to remove the illegal entrance, as a duty especially enjoined upon him by law.

Upon the issuance of an alternative writ the superintendent appeared and demurred to the sufficiency of the petition, and answered that the petitioner was not entitled to the writ, because there was a plain, speedy, and adequate remedy for the removal of the objectionable entrance, provided by the ordinance itself and by the general law; and because the entrance had been legalized and suffered to continue by resolution and order No. 15,814 of the board of supervisors, passed July 18, 1882, etc.

The court held that the return was insufficient, and that the petitioner was the party beneficially interested and entitled to a peremptory writ. In this there was legal error.

The sidewalks of a public street of a city are parts of the street. Any obstruction of the sidewalk is therefore an obstruction of the street and a nuisance; but it is a public nuisance, because it interferes with the free use of the street by the traveling public in general, and not merely some particular person; it is therefore an offense against the public, which is remediable by the public only, and not actionable, except where an individual has suffered some special damage beyond what is common to himself with the rest of the public.

In modern practice mandamus is regarded as an action by the party who applies for it, under the provisions of the Code, to enforce a private right when the law affords him no other adequate remedy. In his application he must show that he is the party beneficially interested in the right asserted, and that there is a corresponding obligation on the part of the officer to do the act required of him. If the private right, on the one hand, or the obligation, on the other, be doubtful, the court will not interfere. (*Arberry v. Beavers*, 6 Tex. 457; 55 Am. Dec. 791; *State v. Commons*, etc. 11 Kan. 69.) Assuming, therefore, that the obstruction of the sidewalk is a nuisance, and that the law imposed upon the superintendent of streets the obligation to abate or remove it, we think the petitioner is not entitled to mandamus for that purpose, because, upon the facts stated in his petition, he does not present a case within the exception to the rule, that a private action cannot be maintained for a public injury.

The facts upon which he relies as the basis of his action to enforce an alleged private right in himself, affirmatively show

that the obstruction in the sidewalk, of which he complains, is not more injurious to him than it is to the inhabitants at large. Any injury or annoyance which he suffered from it may be greater in degree, but it is not different in kind from that sustained by the public; therefore, he receives from it no special injury for which he is entitled in law to a private action (*Hopkins v. Western Pac. R. R. Co.* 50 Cal. 194; *Bagley v. Nunan*, 53 Cal. 403), or in equity to a writ of injunction (*Payne v. McKinley*, 54 Cal. 532), or in a special proceeding to a writ of mandate. (*Linden v. The Board of Supervisors*, 45 Cal. 6; *Harpending v. Haight*, 39 Cal. 189.)

Besides, as the alleged obstruction was legalized by the board of supervisors, it was not the duty of the superintendent to remove it. A legalized obstruction in a sidewalk of a street loses its character as a nuisance.

Judgment reversed and cause remanded for further proceedings.

MCKINSTRY, J., and ROSS, J., concurred.

[No. 8929. Department One.—June 23, 1885.]

JAMES WALLACE, ADMINISTRATOR, ETC., OF ELIZABETH PERKINS, DECEASED, RESPONDENT, v. JOHN CENTER ET AL., APPELLANTS.

DISMISSAL OF ACTION—JUDGMENT—DEATH OF PLAINTIFF—SUBSTITUTION OF PERSONAL REPRESENTATIVE.—A judgment dismissing an action for want of prosecution is not void, although made after the death of the plaintiff, and without the substitution of his personal representative.

APPEAL from an order of the Superior Court of the city and county of San Francisco made after judgment.

The facts are stated in the opinion of the court.

Wilson & Wilson, for Appellants.

Edward Kirkpatrick, for Respondent.

ROSS, J. — It appears from the record that on the 19th of July, 1865, Elizabeth Perkins commenced an action against the

defendants. Years passed, and finally, on the 18th of September, 1876, the cause was regularly called for trial in the late Fourth District Court, and no one appearing on the part of the plaintiff, the defendants, by their counsel, moved the court to dismiss the action for want of prosecution, and judgment of dismissal was accordingly entered and recorded on the 19th of October, 1876. Term after term of the District Court passed, and no motion of any character was made in the case. The statutory time of one year allowed for appeal from the judgment elapsed without appeal; the court itself went out of existence with the year 1879, and was succeeded by the Superior Court created by the new Constitution, and to that court there was presented, on the 1st of August, 1882, an affidavit stating that Elizabeth Perkins died on the 3d day of November, 1875, prior to the judgment of dismissal, and upon that affidavit, and the suggestion of the death of Elizabeth Perkins, an order was made by the Superior Court, substituting James Wallace, administrator of the estate of Elizabeth Perkins, as plaintiff in the case. And subsequently, upon notice given to the former counsel of the defendants, and based upon the affidavit showing the death of the original plaintiff, the Superior Court made an order vacating and setting aside the judgment of dismissal. The appeal is from that order.

It is entirely clear that the order can only be sustained upon the theory that the judgment of dismissal was absolutely void; and that it was not so is shown by the recent case, entitled *Phelan v. Tyler*, 64 Cal. 80. The right to attack the judgment for "irregularities" was long since lost by lapse of time.

Order reversed.

McKEE, J., and McKINSTRY, J., concurred.

[No. 8862. Department One.—June 23, 1885.]

MICHAEL ROBINSON, RESPONDENT, v. THE IRISH-AMERICAN BENEVOLENT SOCIETY, APPELLANT.

BENEVOLENT CORPORATION—CONSTITUTION AND BY-LAWS—ASSENT TO BIND MEMBERS.—A member of a benevolent corporation who has assented to the provisions of its constitution and by-laws is bound by them.

ID.—ALLOWANCE TO SICK MEMBERS—ACTION TO RECOVER.—The constitution of the corporation provided that members when sick, upon complying with certain conditions, should be entitled to an allowance out of the funds of the corporation; that the board of trustees should examine all claims of members for such allowance, and that no money should be paid out of the corporate funds except upon the order of the trustees. *Held*, that a member could not maintain an action to recover the allowance until after the board of trustees had been given an opportunity to examine his claim therefor.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

M. C. Hassett, for Appellant.

The plaintiff was bound by the constitution and by-laws of the corporation. (Civ. Code § 599; Angell & Ames on Corporations, § 325; *Cummings v. Webster*, 43 Me. 192; *Como v. Brigham*, 39 Me. 35.) The action cannot be maintained as no opportunity was given the trustees to examine the plaintiff's claim. (*Anacosta Tribe No. 12, Improved Order of Red Men v. Murbach*, 13 Md. 91; *Black and Whitesmith's Society v. Van Dyke*, 2 Whart. 309; *Toram v. Howard Beneficial Assoc.* 4 Pa. St. 519.)

H. A. Powell, for Respondent.

Ross, J.—The defendant is a benevolent corporation organized under the laws of the State, its object in part being the relieving and assisting of its sick members. The plaintiff became a member in 1869, and has since been a member thereof in good standing and entitled to all its benefits. The constitution governing the corporation provides for the election of a physician, whose duty it is to attend the sick members, and among other things, "to give a certificate of bad health when applied to

and the case warrants it." It is also provided by the constitution that "any beneficial member of this society who is sick and receives the doctor's certificate, shall be entitled to eight dollars per week during the continuance of his illness, provided such sick member shall not be absent from his house later than 8 o'clock P. M.; and it shall be the duty of the society's physician to send in a written statement every two weeks, stating how such sick member is getting on, and also send certificate of sickness at the same time, stating the nature of his disease," etc. It is further provided that the board of trustees provided for by the constitution, and who are required to hold their regular meetings on the Friday evening preceding the regular meetings of the society, "shall investigate all complaints connected with the affairs of the society, and the recording secretary shall report the same at the following meeting. They shall have full power to act in all cases submitted to them by the society, and from their decisions there shall be no appeal. . . . No moneys shall be withdrawn from the deposit unless by a majority of the board of trustees. They shall also examine all claims of members for sick allowance, and if found correct order the same paid."

It appears from the record that on the 3d of October, 1881, the plaintiff demanded of the society payment to him of \$352, which he claimed to be due him as sick allowance, accruing subsequent to November 29, 1880. The claim was presented to the society at its regular monthly meeting, which was held the evening of the day of the demand, and was by the society referred to its board of trustees. Instead of awaiting the consideration and determination of the board, the plaintiff within a few days commenced this suit against the society to recover the amount claimed by him. He undoubtedly did so, as appears from the record, because the physician at the instance of one of the trustees had some time before ceased furnishing the plaintiff with a certificate of his illness. It clearly appears from the evidence that plaintiff was sick and unable to work during the time for which he claimed the allowance, and had been so circumstanced for a long time prior thereto. But it is not to be presumed that the board of trustees would, upon the facts being made to appear, have refused to award the plaintiff the relief to which he was entitled. At all events, the plaintiff, when he became a member of the

society, assented to the provisions of its constitution and by-laws and is bound by them. The constitution of the society in terms provides that the board of trustees shall examine all claims of members for sick allowance, and if found correct, order the same paid. In this case, without even giving the board an opportunity to examine his claim, the plaintiff resorted to suit. (See *Anacosta Tribe No. 12, Improved Order of Red Men v. Murbach*, 13 Md. 91; 71 Am. Dec. 625, and *Van Dyke's Case*, 2 Whart. 309.)

Judgment and order reversed.

McKEE, J., and MCKINSTRY, J., concurred.

Hearing in Bank denied.

[No. 8518. Department One.—June 23, 1885.]

H. ESCOLLE, APPELLANT, v. CHRISTIAN FRANKS,
RESPONDENT.

SALE—CHANGE OF POSSESSION—IMMEDIATE DELIVERY—CREDITOR, WHEN ESTOPPED TO DENY.—A creditor of a vendor of personal property is estopped to deny that the sale was followed by an immediate delivery and continued change of possession, if after the sale he recognized the title of, and caused the property to be delivered to the vendee, and upon the faith of such acts, the vendee took the property and expended money in its care, which otherwise he would not have done.

APPEAL from a judgment of the Superior Court of the county of Monterey, and from an order refusing a new trial.

The action was brought to recover damages for the conversion of certain sheep. The defendant, as sheriff, justified the taking under an attachment issued in an action instituted against the vendor of the plaintiff. The further facts are stated in the opinion of the court.

D. M. Delmas, for Appellant.

The attaching creditor is estopped by his conduct from questioning the validity of the sale and transfer of possession to the plaintiff. (*Steil v. Brown*, 1 Taunt. 381; *Coburn v. Pickering*, 15 N. H. 415.)

Wm. H. Webb, James A. Wall, and Hiram D. Tuttle, for Respondent.

Ross, J. — The contest in this case is between a purchaser of personal property and a creditor of the vendor. A certain lot of sheep constitutes the subject of the controversy. It is not denied, and was expressly found by the court below that the plaintiff bought the sheep from the owner, one Gout, in good faith and for value, but it is contended by the defendant and was found by the court below as a fact, that the sale was not followed by an immediate delivery and continued change of possession. This finding is assailed by the plaintiff upon the ground that it is contrary to the evidence in the case, but we find it unnecessary to pass upon that point for the reason that it appears in the case that after the attachment of the sheep, which occurred at the instance of the creditor of Gout, subsequent to the sale by the latter to the plaintiff, the creditor, whose name is Tresconi, sent for the plaintiff to have a talk about the sheep and a settlement of the matter. He said to plaintiff that Gout and one Despney owed him money, and that he had sued them for it, and attached the sheep. The plaintiff replied that he had bought the sheep from Gout, and had paid him \$1.25 per head for them. Tresconi said if he had known that he would not have attached them, and that he would have them released and returned to the plaintiff. Plaintiff told Tresconi not to do so if he thought he had a better right to the sheep than plaintiff. Tresconi then asked plaintiff if he released the attachment if plaintiff would sue him for damages, to which plaintiff responded no. Tresconi then caused the sheep to be released and to be turned over by the sheriff to the plaintiff, who took them and subsequently expended about \$400 in and about the care of them, which he would not have expended but for the conduct of Tresconi in the matter of the release. Under these circumstances Tresconi cannot be heard to question the sale by Gout to the plaintiff upon the ground that it was not followed by an immediate delivery and continued change of possession. The sale was good as between the parties to it. The evidence, as well as the findings, show that it was made in good faith and for full value, and that there was no intent on the part of the vendor

or vendee to hinder, delay, or defraud the creditors of the former. If a creditor make any statement or agreement, in effect confirming the sale, "upon the faith of which the grantee acts as he would not otherwise do, or under such circumstances that his subsequent assertion of his rights as a creditor, if permitted, would operate as a fraud, he will be held to have confirmed the transfer." (Bump on Fraud. Convey. p. 458, and authorities there cited.) In this case Tresconi recognized plaintiff's purchase, released his attachment, caused the sheep to be returned over to the plaintiff, and upon the faith of those acts the plaintiff took the sheep and expended about \$400 in and about their care, which he would not otherwise have done. After all this, to permit Tresconi to question the sale would be to countenance a palpable fraud on the plaintiff.

Judgment and order reversed and cause remanded for a new trial.

MCKINSTRY, J., and MCKEE, J., concurred.

[No. 9877. Department One.—June 23, 1885.]

WM. CAMPE, APPELLANT, v. C. LASSEN ET AL.,
RESPONDENTS.

JUDGMENT, HOW PLEADED—SUPERIOR COURT—JURISDICTION—PRESUMPTION.—The Superior Court being a court of general jurisdiction, it is not necessary, in pleading a judgment thereof, to aver the facts conferring jurisdiction. They are presumed by law. An allegation that the judgment was recovered in a designated action is sufficient.

PLEADING—FAILURE TO DENY ALLEGATION—ADMISSION—FINDINGS.—The failure to deny a material allegation of a complaint is an admission thereof, and a finding to the contrary is erroneous.

APPEAL from a judgment of the Superior Court of the county of San Mateo, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

F. J. Castlehun, for Appellant.

The judgment was sufficiently pleaded. (Code Civ. Proc. § 456; *Home Ins. Co. v. Drake*, 43 Ind. 418; 2 Chitty on

Plead. 482; *Lee v. Figg*, 37 Cal. 331; *Lander v. Beers*, 48 Cal. 546; *McCutcheon v. Weston*, 65 Cal. 37.)

Fox & Kellogg, for Respondents.

MCKEE, J. — This is a suit in equity to set aside a deed made by the defendant C. Lassen, to his co-defendant, on the ground that it was made to hinder, delay, and defraud the plaintiff of his judgment.

At the trial, the plaintiff gave no evidence that he was a judgment creditor of the defendant C. Lassen, and the court found that he was not, and dismissed the suit. But the complaint contained the following allegations, which were not denied:—

“That on the 19th day of September, 1883, in the Superior Court of the city and county of San Francisco, State of California, said plaintiff recovered a judgment against the said defendant C. Lassen, *alias* N. C. Lassen, for \$1,174.34, principal and interest, and twelve dollars cost of suit, in an action wherein this plaintiff, and the defendant C. Lassen, *alias* N. C. Lassen, was named defendant.

“That on the 19th day of September, 1883, said judgment was entered in the office of the clerk of said Superior Court of the city and county of San Francisco, State of California, and on the 15th day of November, 1883, a transcript of said judgment was filed in the office of the county recorder of San Mateo County, State of California, the county in which said defendants lived at the time said action was begun and in which they still live.”

If well pleaded these allegations are admitted to be true; and we think they sufficiently present an issuable fact of the rendition of a judgment in favor of the plaintiff and against the defendant in a court of general jurisdiction.

It is contended, however, that the facts showing the jurisdiction of the court should have been stated. In other words, it should have been stated that an action had been properly commenced to put in motion the jurisdiction of the court over the subject-matter of the action, and that the court had acquired jurisdiction of the parties to the action. But the allegation is broadly that the judgment was recovered in an action pending

between the parties in the Superior Court of the city and county of San Francisco, and the legal presumption is that that court being a court of general jurisdiction, had jurisdiction to render the judgment. In pleading a judgment of a court of general jurisdiction there is, therefore, no necessity for averring the facts which confer jurisdiction; they are presumed by law.

The findings of the court being against the admissions of the pleadings, the judgment appealed from is erroneous.

Judgment reversed and cause remanded for further proceedings.

MCKINSTRY, J., and SHARPSTEIN, J., concurred.

[No. 8754. Department Two.—June 23, 1885.]

JAMES DURYEA ET AL., RESPONDENTS, v. W. K.
BOUCHER ET AL., APPELLANTS.

MINING CLAIM—NOTICE OF LOCATION—ERRONEOUS DESCRIPTION.—An erroneous statement in a notice of location of a mining claim as to the quarter section in which the claim is situated, will not invalidate the notice, if the remaining portions of the description sufficiently identify the land.

ID.—DESCRIPTION, WHEN SUFFICIENT.—The description in a notice of location of a mining claim is sufficient, if it designate the number of acres claimed, and define its boundaries on three sides.

ID.—ACTION TO DETERMINE RIGHT OF POSSESSION—JUDGMENT—FINDINGS—EVIDENCE.—In an action to determine the right of possession to a mining claim, an erroneous finding as to the location of the premises in controversy will not warrant a reversal, if the judgment be conclusively supported by the evidence and the other findings.

APPEAL from a judgment of the Superior Court of Calaveras County, and from an order refusing a new trial.

The action was brought under section 2326 of the United States Revised Statutes to determine the right of possession to ten acres of placer mining ground, being the north half of the north half of the southwest quarter of the southeast quarter of section 13, T. 5 N., R. 11 E., Mount Diablo base and meridian. The plaintiffs based their right of possession upon a location made in July, 1876, of a track of thirty acres. Their notice of location described the claim as containing "thirty acres of land

in section 13, T. 5 N., R. 11 E., Mount Diablo base and meridian, being the north half of the south half of the southwest quarter of the southwest quarter of said section, being bounded on the south by the old Shaw claim, on the east by the Clum ranch, on the north by the Paul claim, and on the west by unoccupied lands." In this notice the statements as to the governmental subdivisions were erroneous; otherwise the notice included the lands in controversy. The defendants claimed under a location made by Gleason and O'Neil in May, 1880. The further facts are stated in the opinion of the court.

W. E. Turner, for Appellants.

The notice of location posted by the plaintiffs in 1876 did not embrace the land in controversy. The description should have conformed to the rectangular subdivisions as established by the survey. (U. S. Rev. Stats. §§ 2324, 2331; *Golden Fleece Co. v. Cable Con. Co.* 12 Nev. 323; *Mallib v. Uncle Sam Min. Co.* 1 Nev. 194; *Dutch Flat Water Co. v. Mooney*, 12 Cal. 535; *King v. Edwards*, 1 Mont. 239.)

W. T. Lewis, and *A. C. Adams*, for Respondents.

In considering ambiguous descriptions in the locations of mining claims, the same rule of construction obtains as in the construction of deeds, where like ambiguities exist. So construed the description in the notice of location of the plaintiffs was sufficient. (*Wade v. Deray*, 50 Cal. 376; *Colton v. Seavey*, 22 Cal. 496; *Franklin v. Dorland*, 28 Cal. 175; *Piercy v. Crandall*, 34 Cal. 334; *Stanley v. Green*, 12 Cal. 148.)

THORNTON, J. — We think that the location of the mining claim by plaintiffs in July, 1876, was made in accordance with law, and included the ten acres in controversy. The notice as recorded and posted was sufficient. It described the land by the adjoining tracts on the north, east, and south, and on the west by unoccupied lands. As the claim was for thirty acres, its boundary on the west could be easily determined. It makes no difference that the wrong legal subdivisions are inserted in the notice. These may be rejected as false where the remaining description sufficiently identifies the land, in accordance with

the maxim *falsa descriptio non nocet cum de corpore constat*. (Broom's Legal Maxims, 605; 1 Greenleaf Ev. § 301.) The rule may be thus stated: As soon as there is an adequate and sufficient description, with convenient certainty, of what is intended to pass by the particular instrument, an erroneous addition will not vitiate it. So much of the description as is false will be rejected, and the instrument will take effect, if a sufficient description remain to ascertain its application. The court finds that the plaintiffs did work on the land in dispute and there is evidence to support it.

It is urged that the finding of the court below as to the location of the defendants Gleason and O'Neil, of the ten acres in controversy, is contrary to the evidence, inasmuch as the ten acres are described in the finding as being in the *southwest* quarter of section 13, T. 5 N., R. 11 E.; that the evidence shows beyond dispute that the tract of ten acres is in the southeast quarter, and therefore the finding is not sustained by the evidence. But the other findings, which are sustained by the evidence, and the conclusions of law which are properly deduced, show that the plaintiffs are entitled to a judgment in their favor if the description of the land in the finding was, as it should be, the southeast quarter. Under such circumstances the cause should not be sent back for a new trial.

Judgment and order affirmed.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 8621. Department Two.—June 23, 1885.]

M. DAVIDSON ET AL., RESPONDENTS, v. RICHARD F.
KNOX ET AL., APPELLANTS.

PARTNERS—ACTION AGAINST—DEFENDANTS NOT SERVED—JUDGMENT.—

In an action against copartners on a partnership obligation, where the names of all the individuals composing the firm are set forth both in the caption and the body of the complaint and summons, with the addition that they are doing business under a firm name, judgment cannot be rendered under section 388 of the Code of Civil Procedure against those defendants who have not been served with process and have not appeared; but a judgment entered in such action against those who have been served will not be vitiated as to them because the other defendants are included therein.

APPEAL from a judgment of the Superior Court of Calaveras County.

The facts are stated in the opinion of the court.

Carter P. Pomeroy, for Appellants S. P. and P. V. R. Ely, cited *Shepard v. Lightfoot*, 56 Ala. 505.

Scrivner & Boone, and *Ira H. Reed*, for the other Appellants.

Wesley K. Boucher, *A. C. Adams*, and *A. L. Rhodes*, for Respondents.

Even if the judgment against the non-served defendants were void, it would still be valid against the others. (*Kelly v. Bandini*, 50 Cal. 530.)

THORNTON, J. — In the caption of the complaint in this action the defendants are thus named and described: —

“Richard F. Knox, Joseph Osborne, Samuel R. Ely, W. T. Robinson, and Philip V. R. Ely, copartners, doing business under the firm name of Knox & Osborne.”

The averment in the complaint as to the relations of defendants to each other is as follows: —

“That the said defendants, Richard F. Knox, Joseph Osborne, Samuel P. Ely, W. T. Robinson, and Philip V. R. Ely, now are, and during all the times mentioned in said complaint have been, partners and associates, doing business under the firm name of Knox & Osborne, and as such partners and associates, owning, working, and operating a certain quartz mine and quartz mill, situate near the village of Mokelumne Hill, in said county and State; the said mine being named the Esperance Quartz Mine, and the said mill being known as the Knox & Osborne Quartz Mill.”

The complaint asks for judgment against “said defendants.”

The caption of the summons as regards defendants is in the same words as the caption of the complaint above quoted.

In the summons these words are used as to the defendants to whom it is directed and who are required to appear and answer: —

“The people of the State of California send greeting to Richard F. Knox, Joseph Osborne, Samuel P. Ely, W. T. Robinson,

and Philip V. R. Ely, associates and partners, doing business under the firm name of Knox & Osborne."

As to the requirement to appear and answer the language employed in the summons is: "You are hereby required to appear in an action brought against you . . . and to answer." . . .

The notification to the defendant in the summons is as follows:—

"And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you for the whole of the principal sum and accrued interest thereon as expressed in said notes and prayed for in their said complaint, and for costs of suit."

Service was made on Robinson, Knox, and Osborne only. Robinson made default and Knox and Osborne answered. The cause was tried and the court rendered judgment as follows:—

"Wherefore, by reason of the law and the findings aforesaid, it is ordered and adjudged that the plaintiffs, the said M. Davidson and S. C. Peek, do have and recover of and from the said defendants, Richard F. Knox, Joseph Osborne, W. T. Robinson, Samuel P. Ely, and Philip V. R. Ely, partners and associates doing business under the firm name of Knox & Osborne, the sum of five thousand and thirty-five and seventeen one hundredths dollars (\$5,035 17-100) in gold coin of the United States, with legal interest thereon from date until paid, together with the plaintiffs' costs and disbursements incurred in this action, amounting to the sum of seventy-two dollars (\$72).

"And it is further ordered and adjudged that the said plaintiffs do have execution against the separate property of the defendants, Richard F. Knox, Joseph Osborne, and W. T. Robinson, or either of them, the parties served with process in this action, as well as against the joint property of all of said defendants, partners, and associates as aforesaid."

This appeal is prosecuted by all the defendants, and they contend that the judgment is erroneous in that it is rendered against all the defendants, two of whom, the Elys, were not served, with a direction that the plaintiff have execution against the separate property of the parties served, and the joint property of all the defendants.

No such judgment is authorized by section 414 of the Code of Civil Procedure, which provides that when the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. The practice act formerly in force had a section somewhat similar to the section just above referred to. (See Pract. Act, § 32.) This section 32 in terms authorized such a judgment as was entered in this case. But no such provision is now found in the Code of Civil Procedure. It was probably omitted in consequence of what was said as to its constitutionality in the opinion of the court in *Tay v. Hawley*, 39 Cal. 93.

But it is argued for the respondents (plaintiffs below), that the judgment is sustained by the provisions of section 388 of the Code of Civil Procedure. That section is as follows:

“When two or more persons associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants, and had been sued upon their joint liability.”

We think it sufficient to say that the action was not instituted under section 388. The clauses quoted above from the complaint and summons show no intent to proceed under this section. Individuals in the captions of both summons and complaint are named as defendants, and are described as doing business as partners under a firm name. All the parties are named. This is also true of two of the clauses quoted above. The individuals are required to appear and answer, they are notified that if they do not appear, judgment will be taken against them, and in the complaint judgment is asked against “said defendants.” The same forms of expression as are herein employed are those ordinarily used in actions against the individual members of a partnership on a partnership contract. Such being the case, we see no reason why we should construe the action to be one brought under section 388. In an action brought under this section it

is not necessary to name all of the associates as defendants. In fact the association designated by its common name is the only defendant, and the judgment authorized is one binding only the joint property of the association. It will thus be seen that the judgment here rendered is not in accordance with either sections 388 or 414 of the Code of Civil Procedure. Under the former there can be no judgment against the separate property of any associate, and under the latter no judgment is allowed against the joint property at all.

We are of opinion that this is an action against the individual partners doing business under the firm name of Knox & Osborne on partnership contracts, and in such case under section 414 of the Code of Civil Procedure, the plaintiffs can only proceed against the parties served.

The foregoing views dispose of the case and render it unnecessary to pass on the constitutional question discussed by counsel.

The plaintiffs are entitled to judgment against Robinson, Knox, and Osborne who were served with process, but not against the Elys who were not served. The judgment should then be modified by striking therefrom the names of the Elys, allowing it to stand as against the served parties.

The cause is remanded to the court below with a direction to modify the judgment as above indicated.

Ordered accordingly.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 8745. Department Two.—June 23, 1885.]

**BANK OF UKIAH, APPELLANT, v. SUSAN SHOEMAKE,
EXECUTRIX, ETC., RESPONDENT.**

ESTATES OF DECEASED PERSONS—REJECTION OF CLAIM—STATUTE OF LIMITATIONS.—The period of three months within which an action upon a rejected claim against the estate of a deceased person must be brought under section 1498 of the Code of Civil Procedure does not commence to run until the actual rejection of the claim by an indorsement to that effect.

APPEAL from a judgment of the Superior Court of Sonoma County.

The facts sufficiently appear in the opinion of the court.

T. L. Carothers, and Henley, Whipple & Oates, for Appellant.

A. B. Ware, for Respondent.

THORNTON, J. — The court is of opinion that the rejection referred to in section 1498 of the Code of Civil Procedure, from the date of which the time for bringing an action on a rejected claim begins to run, is an actual rejection of the claim by the personal representative of a deceased person, and that it has no reference to the refusal by or neglect of the personal representative to indorse on the presented claim a refusal or rejection for ten days after the claim has been presented to him. Such refusal or neglect to indorse may, at the option of the claimant, be deemed equivalent to a rejection on the tenth day after the presentation. (§ 1496, Code Civ. Proc.) This clause is inserted only to enable the claimant to bring his action after the lapse of the tenth day if he so elect, on the occurrence of such neglect or refusal. But the period in which the action is barred does not commence to run in any event until after the actual rejection of the claim by an indorsement to that effect. It does not appear from the complaint that the claim has ever been actually rejected. We therefore think the action was commenced in time though it was brought more than three months after the *deemed rejection*.

It follows from these views that the court erred in sustaining the demurrer to the complaint, and the judgment must be reversed and cause remanded to the Superior Court of Sonoma County with a direction to that court to overrule the demurrer, and for such other proceedings as may be in conformity with law.

So ordered.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 8967. Department Two.—June 23, 1885.]

HARRIET MCGREGOR, ADMINISTRATRIX, ETC., OF JOHN MCGREGOR, DECEASED, APPELLANT, v. P. J. DONELLY, RESPONDENT.

SWAMP LANDS—AGREEMENT TO PURCHASE FOR BENEFIT OF ANOTHER—CERTIFICATE OF PURCHASE.—An agreement to acquire swamp and overflowed lands from the State, for the use and benefit of a person other than the applicant, is void under the Act of April 27, 1863. The parties to such an agreement are *in pari delicto*, and after the certificate of purchase has come into the possession of the party for whose benefit the application to purchase was made, the applicant cannot maintain an action to compel its specific delivery to him.

ESTATE OF DECEDENT—ACTION BY PERSONAL REPRESENTATIVE—DEFENDANT MAY TESTIFY.—In an action by the personal representative of a deceased person to enforce a demand due the estate of the decedent, the defendant is a competent witness as to transactions between himself and the decedent.

APPEAL from a judgment of the Superior Court of Humboldt County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

J. D. H. Chamberlin, and *James Hanna*, for Appellant.

S. M. Buck, and *Cope & Boyd*, for Respondent.

THORNTON, J.—In this case the evidence shows, and it is substantially found, that by an arrangement made between John McGregor, plaintiff's testator, and H. S. Soule, the former made an affidavit and application for the purchase from the State of certain swamp and overflowed lands, lying in the county of Humboldt, for the use and benefit of the latter. Soule was to pay the cost and expense attendant on the application to purchase, and such cost and expense were either paid by him, or by Ryan claiming under him. To state the facts more particularly, Soule paid the county surveyor all his fees, charges, and expenses for surveying, platting, and making the field notes of the land covered by the application. He paid the twenty per cent of the purchase price of the lands and the first year's interest on the remainder of the price. At this stage in the proceeding to purchase, Soule substituted Ryan in his place, and Ryan after this paid whatever expense was necessary up to the procurement of the certificate of purchase. The application was made under the Act of April 27, 1863 (see Stats. 1863, p. 591),

on the 20th of March, 1865, and the certificate of purchase was issued on the 19th of January, 1866. McGregor died testate on the 12th day of September, 1865. The certificate, after its issuance, got into the hands of Ryan, who delivered it to defendant, to whom, after the certificate was issued, Ryan sold and conveyed the land involved herein. The certificate was in possession of defendant when this action was brought.

The plaintiff, the administratrix with the will annexed of John McGregor, brings this action, which is an action in equity, to compel the specific delivery by defendant of the certificate of purchase to her.

The action here is brought to recover the result or fruit of the arrangement or contract made between plaintiff's testator and Soule. Ryan and defendant claim under this arrangement and are in privity with Soule. Ryan took Soule's place, and defendant Donelly took the place of Ryan. It is contended on behalf of defendant that this contract was illegal in its inception, and, therefore, that plaintiff cannot recover the certificate which was issued upon it. We are of opinion that the contention of the respondent is sound.

The contract within the rule laid down in *Churchill v. Anderson*, 56 Cal. 56, which we approve, is violative of the statute by authority of which the purchase in this case was attempted to be made, and therefore void. In the case cited as in this, the proceeding to purchase was under the Act of 1863 above referred to. The case cited was in regard to an application to purchase lieu lands, and in that respect it differs from this; but the provisions of the Act of 1863, referred to in the opinion in *Churchill v. Anderson*, on which the conclusion is there reached, apply alike to the swamp and overflowed lands involved herein.

We are of opinion that the intent of the Act of 1863 manifested by the provisions referred to in the case in 56th California, was plainly that the application and purchase authorized by it was to be for the benefit of the applicant himself; that this was distinctly the policy of the act, a policy adopted to prevent the acquisition of large tracts of land by one person through the use of other persons.

The affidavit made in this case as required by the statute, states that the applicant has not entered under the provisions of

any law of this State providing for the sale of swamp and overflowed lands, any other land which, with the land sought to be purchased, shall exceed 640 acres.

If such evasion of the statute as is attempted in this case should be allowed, it would be a very easy matter for one who had acquired under the laws above mentioned 640 acres, and therefore could not take the oath prescribed by the employment of others who could take the oath, to acquire for himself, in manifest disregard of the intent and policy of the act, many times 640 acres.

It is contended that the plaintiff should recover because she does not rely on the illegal contract for a recovery herein. We cannot so understand the pretention of plaintiff. It is true, an attempt is made to eliminate from the transaction the contract altogether, by relying on that portion which McGregor could lawfully do if acting for himself, and rejecting everything as to the agreement with Soule. But the contract was entire, and, as was said by Selden, J., in *Tracy v. Talmage*, 14 N. Y. 191, 67 Am. Dec. 132, "it is contrary to all the rules which have been applied to illegal contracts to discriminate between their different parts, and hold one portion valid and the other void."

Reliance is placed in this case by plaintiff on the affidavit and application of McGregor, the fact that all the proceedings were taken in his name to effect the purchase, and the further fact that the certificate of purchase was issued in his name. But every step taken was taken in pursuance of the agreement made between McGregor and Soule. *Non constat*, that the affidavit and application would ever have been made if this agreement had not been entered into. McGregor did not wish to purchase. In fact he did not purchase. He paid nothing, and never intended to pay anything. He was a mere *dumb, passive instrument* in the hands of Soule in this illegal purpose forbidden by law. McGregor assisted Soule in this illegal purpose in every way Soule desired his assistance. By their joint acts, each and all of which were illegal, a result forbidden by law was accomplished. Neither McGregor nor plaintiff claiming under him should derive any benefit from it. All of the parties concerned are *in pari delicto*, and neither in our opinion should be allowed to recover. (See *Biggs v. Lawrence*, 3 Term Rep. 454; *Clugas*

v. *Penaluna*, 4 Term Rep. 466; *Waymell v. Reed*, 5 Term Rep. 599.)

We make this remark in relation to defendant's claims set up in his cross-complaint, which we have fully examined. Neither at law nor in equity should either be permitted to recover.

But it is said the evidence showing the illegality of the contract came from Soule and Ryan, who were incompetent witnesses, and their evidence inadmissible under section 1880 of the Code of Civil Procedure. The action of plaintiff is not one against an executor or administrator upon a claim or demand against an estate of a deceased person. It is an action brought to recover something claimed to belong to the estate against a third person, brought by the administratrix to enforce a demand by the estate. Under such circumstances we see no reason why Soule and Ryan were not competent witnesses and their testimony admissible. The parties are *in pari delicto*, neither can recover, and in such case the law leaves the parties as they were.

These views dispose of the case, and it is unnecessary to say anything upon the other points discussed by counsel.

The judgment and order are reversed and the cause remanded with a direction to the court below to dismiss the action, each party to pay his own costs in that court.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 8447. Department Two.—June 23, 1885.]

WM. D. HENDERSON, RESPONDENT, v. JOANNA
NICHOLAS ET AL., APPELLANTS.

PARTNERS—APPROPRIATION OF WATER—CONVEYANCE BY PARTNER.—One partner in a water-right acquired by appropriation cannot convey the interest therein of his copartner.

APPEAL from a judgment of the Superior Court of Calaveras County, and from an order refusing a new trial.

The action was brought to restrain the defendants from interfering with plaintiff's right to the use of the waters of a certain creek. The further facts are stated in the opinion of the court.

J. B. Lamar, for Appellants.

W. K. Boucher, and *J. G. Severance*, for Respondent.

THORNTON, J. — As early as 1858, plaintiff and his brother, J. M. Henderson, appropriated and used the water in controversy in this cause, and plaintiff has continued to use one half of it ever since, until prevented by the acts of the defendants. The conveyance of J. M. Henderson to Latori and others of the interest described in it, which was afterwards transferred to defendant George Nicholas, at most only conveyed his interest in the water-right, and did not affect the interest of plaintiff. One partner can convey only his interest. We know of no rule of law by which he could convey more. The right which defendant George Nicholas acquired from the United States was subject to the water-right of plaintiff. (Rev. Stats. U. S. §§ 2339, 2340.)

The judgment, however, herein should more definitely describe the interest of the plaintiff designed to be protected by it. The last clause in the judgment should be modified so as to read as follows:—

“It is further ordered, adjudged, and decreed that the plaintiff is the owner by prior appropriation of and entitled to use one half of the waters of McKenney’s creek to the extent of the capacity of the ditch described in the complaint herein, which capacity is one hundred and twenty-five inches, for irrigating his garden and other useful purposes, but plaintiff’s right herein adjudged does not exceed one half of the capacity of said ditch; and it is further adjudged that he is entitled to the use of said ditch for the flow of the waters hereby decreed to him.”

“And it is further ordered and adjudged that the defendants herein, their agents, employees, and servants, are hereby perpetually enjoined and restrained from interfering in any way with plaintiff’s rights to said water and the use of the ditch hereby decreed to him.”

The portion of the decree as to the costs and damages is correct, and will remain unchanged.

We find no other error in the record. The cause is remanded

to the court below with a direction to modify the decree in the manner above pointed out.

Ordered accordingly.

SHARPSTEIN, J., and MYRICK, J., concurred.

Hearing in Bank denied.

[No. 8799. Department Two.—June 23, 1885.]

ROBERT E. DOYLE, APPELLANT, v. SHERWOOD CALLAGHAN ET AL., RESPONDENTS.

CONVERSION—DEMAND — PLEADING — RELEASE — DECEIT — STATUTE OF LIMITATIONS.—The complaint alleged that one C being the owner of certain stocks, deposited them with the defendants for safe-keeping, and authorized them to receive the dividends and pay the assessments thereon. Afterwards he demanded the stocks and the defendants refused to deliver them to him. After that he was induced by their false and fraudulent representations to execute and deliver to them a release of all his claims and demands against them. Subsequently he assigned the stocks and all his claims and demands against the defendants growing out of the fraud to the plaintiff, who thereupon demanded of the defendants the delivery of the stocks to him. *Held*, that the refusal of the defendants to deliver the stocks to C on his demand constituted a conversion, that the cause of action stated in the complaint was founded upon such conversion, and not upon the deceit of the defendants in procuring the release, and that the Statute of Limitations commenced to run from the time of the conversion.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Flournoy, Mhoon & Flournoy, Wal. J. Tuska, and Thos. F. Barry, for Appellant.

Lloyd & Wood, for Respondents.

SHARPSTEIN, J. — The allegations of the complaint are to the effect that one Casserly deposited certain stocks with the defendants for safe-keeping, and authorized them to receive the dividends and pay the assessments thereon. Afterwards he duly demanded the stocks and the defendants refused to deliver them to him. After that he was induced by their false and fraudu-

lent representations to execute and deliver to them a release in writing of all his claims and demands against them. Subsequently he assigned said stocks and all his claims and demands against the defendants "growing out of the said fraudulent deceit to the plaintiff," who thereafter demanded of the defendants the delivery of said stocks to him. They refused, "to his damage \$500,000," for which sum he demands judgment against them.

The refusal of the defendant to deliver Casserly's stocks to him on his demand constituted a conversion of his property by them, for which he might at once have commenced an action. But no such action was commenced within the period prescribed by law for the commencement of actions of that character; and the complaint was demurred to on that ground among others. The demurrer was sustained, and whether property or not is the only question which we have to consider. The appellant insists that it was not, for the reason that the action is brought to recover damages for the fraud and deceit practiced on Casserly, and the cause of action must be deemed not to have accrued until he discovered the facts constituting the fraud, which it is alleged he did not discover until within three years before the commencement of this action.

If this is an action for relief on the ground of fraud, as contradistinguished from an action of trover, the cause of action must be deemed to have accrued when Casserly first discovered the facts constituting the fraud and not before. (Code Civ. Proc. § 338.) But if the facts stated in the complaint constitute a case of wrongful conversion of personal property by the defendants, of which Casserly was advised more than three years before the commencement of this action, the demurrer was properly sustained. More than three years before the commencement of this action Casserly demanded of the defendants his stocks and they refused to deliver them to him. He then discovered that they had wrongfully converted his property to their own use. After that he released them from all claims and demands which he had against them. They had previously wrongfully converted his stocks to their own use and he knew it. Viewed in that light, the release if it related in any way to that transaction, released the defendant from any claim or demand which Casserly had against them for the wrongful conversion of his property, and

might be set up as a defense to an action based upon such conversion. But if set up as a defense in such an action, it might be avoided by showing that it was obtained by fraud. This action is not brought to have said release canceled. And until it is interposed as a defense in some action brought by the plaintiff against the defendants to recover Casserly's stocks or damages for the conversion of them, it cannot cause any damage to the plaintiff. It was not by or through the release that possession of the stocks was obtained, or that they were wrongfully converted. And the wrongful conversion of them constitutes the gravamen of the plaintiff's complaint as we construe it.

It therefore appearing by the complaint that the plaintiff's cause of action is barred by subdivision 3 of section 338 of the Code of Civil Procedure, we must hold that the demurrer was properly sustained and affirm the judgment.

Judgment affirmed.

MYRICK, J., and THORNTON, J., concurred.

[No. 11044. In Bank.—June 23, 1885.]

THE PEOPLE, APPELLANT, v. WASHINGTON BARTLETT
ET AL., RESPONDENTS.

NEW CITY HALL—SAN FRANCISCO—ACT OF MARCH 24, 1876—CONSTITUTIONAL LAW—SPECIAL LEGISLATION.—The Act of March 24, 1876, providing for the completion of the building known as the New City Hall in the city and county of San Francisco, is constitutional. The act is not an attempt by special legislation to deprive the supervisors of their discretion with respect to a local improvement.

ID.—NEW CITY HALL COMMISSIONERS—TERM OF COMMISSION.—Under this act the new city hall commission continues in existence until the amounts raised by taxation for the new city hall fund has been expended under contracts made by the commissioners.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The proceeding was in the nature of *quo warranto*, to oust the defendants from the office of new city hall commissioners of the city and county of San Francisco, and to compel them to turn over such building, and its management and control, to the board

of supervisors of the city and county of San Francisco. By the Act of April 4, 1870, the governor was authorized to and did appoint three persons as a board of commissioners for the erection and construction of a city hall in the city of San Francisco. Under this act the plans and specifications of the building were made and adopted, and its erection commenced. By an act approved March 30, 1874, this board was abolished, and the building turned over to the board of supervisors of the city and county. On the 24th of March, 1876, an act was passed constituting a board of new city hall commissioners, composed of the mayor, the city and county attorney, and the auditor of the city and county of San Francisco. Under the provisions of this act the defendants claim as the board of new city hall commissioners to hold possession of the new city hall, and to exercise the powers conferred thereby. The further facts are stated in the opinion of the court.

Attorney-General Marshall, Cary, Sullivan & Sullivan, and Daniel Rogers, for Appellant.

John Lord Love, and John F. Swift, for Respondents.

The COURT. — 1. The Act of March 24, 1876, "to provide for the completion of the building known as the New City Hall" (Stats. 1875-76, p. 461), is not subject to the objection that it is an attempt, by special legislation, to deprive the supervisors of all discretion with respect to a local improvement. In *People v. Lynch*, 51 Cal. 33, it was held that the ultimate determination, which shall conclude the tax-payers of a city with reference to a municipal improvement to be paid for by them, must be that of the appropriate local legislature. The statute before us leaves with the local legislature the power of deciding whether the work upon the new city hall shall or shall not proceed as therein provided. The eleventh section of the act reads; "In the event that the board of supervisors shall deem it expedient to continue the construction of the new city hall in the mode and manner prescribed in this act, they are hereby authorized and empowered to express such judgment, by resolution or order, in such form as they may deem proper." The plain intention of the law is not to impose upon the supervisors the duty of levying any tax

to be applied to the construction of the building, or to expenses connected therewith, unless they shall first "by resolution or order" determine to proceed under the act.

The complaint fails to allege that the board of supervisors did not "express their judgment," that it was expedient to continue the construction.

2. The complaint avers that the term of office of the city hall commissioners "under said pretended act of the legislature of March 24, 1876," expired on the 18th of January, 1883. In the points on file it is suggested that the office cease to exist in July, 1881.

On the part of respondents it is claimed the commissioners must remain in office until the new city hall shall actually *be completed*. (§ 17, p. 466.) Appellants contend with much force that the words in the seventeenth section, "erected or completed as in this act provided," require that the building shall be considered as completed, within the meaning of the law, when the moneys raised under its provisions are employed in the manner by the statute directed. Conceding the last to be the correct interpretation the demurrer to the complaint was properly sustained.

Under the eleventh section of the Act of 1876 the supervisors were not empowered to levy or provide for the collection of any tax to complete said building after the expiration of the fiscal year 1880-81. Section 12 provides: "The commissioners in each fiscal year may make contracts and expend in the construction of said building, a sum equal to the estimated receipts of the fund during the current fiscal year, but no larger or greater sum." We do not understand it was the duty of the commissioners to make contracts or to expend (in anticipation) all the estimated receipts of the year, but that they were prohibited from contracting for the expenditure of more than such estimated receipts. Indeed the moneys actually collected for the new city hall fund in each of the four years for which the tax was levied may have been more than the estimate of the commissioners for each of the years. It seems clear that it was intended the new city hall commission should continue until the amounts raised by taxation for the new city hall fund should be expended under contracts made by the commissioners, and under

their directions, or that of the architect. The complaint does not show that there remain no moneys in the new city hall fund to be expended by the commissioners under the provisions of the Act of 1876, or that there remains no work uncompleted which was regularly contracted for by the commissioners.

Judgment affirmed.

[No. 9755. In Bank.—June 23, 1885.]

PLATT A. RAYNOR, RESPONDENT, v. W. H. MINTZER
ET AL., APPELLANTS.

FRAUD—TITLE OBTAINED BY—EQUITABLE RELIEF.—Certain transactions by which the title to real property had been acquired were set aside by the court below, and a reconveyance directed. On a review of the evidence, *held*, that the relief granted was proper.

ID.—PARTIES TO ACTION.—In such a case, the participants in the fraud, and all persons claiming an interest in the property through or by means of the transactions in question, may be joined as parties defendant.

ID.—PLEADING—DEMURREE FOR MISJOINDER OF CAUSES OF ACTION.—The complaint stated a variety of circumstances differing in their nature, but connected with and tending to establish the alleged fraud. *Held*, that the complaint was not demurrable for a misjoinder of causes of action.

APPEAL from a judgment of the Superior Court of San Bernardino County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

A. B. Hotchkiss, for Appellants.

Paris & Goodsell, and *Bennett & Wigginton*, for Respondent.

McKEE, J.—This is a suit in equity to set aside a money judgment, declare void an execution sale made under it, and annul and cancel the certificate of sale and sheriff's deed made to the defendants; or to have the defendants, the grantees named in the deed, adjudged trustees for the plaintiff, in respect of all property belonging to him and transferred to them by the sheriff's deed, and to compel them to reconvey the same to the plaintiff upon such terms as may be just, etc.

Plaintiff claims to be entitled to the relief demanded upon the ground that the action in which the judgment was recovered

was commenced against him, and prosecuted to judgment and execution sale by the plaintiff in the action, not of his own motion, nor in his own behalf, but at the instigation of the defendants and for their benefit, upon an arrangement or conspiracy between them to use, under cover of the plaintiff's name, the proceedings and legal process in the case for the purpose of fraudulently acquiring to themselves Raynor's interest in the lands and premises described in the complaint. The object of the suit is therefore to obtain restitution from the defendants, of real property of the plaintiff claimed to have been acquired, and to be held by them by fraud.

The frauds by which it is claimed the defendants acquired the property arose out of the following transactions: Raynor was insolvent and wholly unable to pay anything to his creditors; but he claimed to be a tenant in common with the defendants, Mintzer, Fox, Peacock, Hunt, Cameron, and Davis, to the extent of an undivided four-sevenths interest in the real property described in the complaint; and that his co-tenants had fraudulently acquired from him his interest, and after acquiring the same, had organized themselves into a corporation by the name of the Colton Land and Water Company, of which they became the only members or stockholders, and to which they transferred the entire common property, which constituted the only capital stock of the corporation, and the same was apportioned among them according to their respective interests in the property. Having thus acquired title to the property, the corporation commenced an action to quiet title against Raynor and to enjoin him from asserting any claim to the property. He appeared in the action and filed an answer containing a cross-complaint, in which he asks as affirmative relief that he be adjudged the owner of an undivided four-sevenths interest in the property conveyed by his co-tenants to the corporation; and that they and the corporation be adjudged to hold the same in trust for him and be compelled to reconvey it to him. On the final hearing of the case the court decided in his favor, adjudged that he was the owner of an undivided four-sevenths of the property conveyed to the corporation, and entitled to a reconveyance of the same from the corporation and the other defendants; and it commanded them to execute and deliver to him a

conveyance of the same. With that adjudication the defendants were dissatisfied and appealed to this court. On the hearing of the appeal, this court, at the January term, 1881, modified and affirmed the judgment of the Superior Court (see *Colton Land and Water Co. v. Raynor*, 57 Cal. 588), and Raynor's ownership and interest in the property was, by that adjudication, fully and legally established.

But pending that appeal the appellants in the action set to work to evade the judgment appealed from, if the appeal should be decided against them. For that purpose they stirred up the creditors of Raynor to sue him upon their claims, and have whatever interest in the property might be finally adjudged to him, levied on and sold. This they did by intimations that the corporation would buy from them whatever interests they might thus acquire. C. P. Clyde was one of Raynor's principal creditors, and an arrangement was made with him whereby he agreed to commence an action upon his claim of \$1,800, against Raynor, and prosecute it to judgment, execution levy and sale for the benefit of the appellants, who were to pay him the amount of his claim, after he had obtained a sale of the property under the judgment and transferred to them the certificate of sale. Clyde carried out this arrangement by commencing an action against Raynor in which he obtained judgment by default, upon which an execution was issued, which was levied upon Raynor's interest in the property. At the execution sale Clyde bought the property in his own name; but the sheriff refused him a certificate of sale because the appellants failed in their promise to pay the fees; and in order to obtain the certificate Clyde agreed with them to take \$1,000, for the interest in the property acquired by the sale, and pay the sheriff's fees. That was done, the fees were paid, the sheriff issued to him a certificate of sale which he immediately assigned to the appellants. The entire transaction was commenced and consummated pending the appeal.

This transaction the court found was, in itself, an open attempt to evade the judgment appealed from, and to acquire in an indirect manner the property which had been adjudged to Raynor, and also a continuation of the scheme, stamped, in the action in which the appeal was pending, as "a fraud on the rights of

Raynor attempted to be carried out by means of the cloaked machinery of a corporation." It therefore ordered all the defendants in the action, except Clyde and the corporation, as trustees of Raynor's title in the property acquired by the sheriff's deed on the Clyde judgment and execution, to reconvey the same to Raynor upon payment of the \$1,000, and interest thereon, which they had given Clyde for the assignment to them of the certificate of sale.

This relief, it is insisted, "is contrary to law and equity," and is based upon findings which do not cover the issues raised by the pleadings in the case, and are not sustained by the evidence.

We cannot agree with this contention; the evidence sustains the findings, the findings cover the issues, and the decisions and judgment are in accordance with the plainest principles of equity. When title to real property has been acquired by fraud, the true owner is entitled to be relieved against the fraud, and to be re-invested with his ownership upon such terms as may be just.

The terms upon which the relief were granted were just. By its decree the court undid the wrong which had been done, and left all the parties to the transaction in possession of their legal rights as they were before the assignment of the certificate of purchase. Raynor was restored to his original position as a tenant in common with his cotenants in the property, upon paying to them the moneys which they had paid to Clyde for his interest in the property. Upon receiving that money they had no longer any right in his property which they could in conscience retain. For it is conceded that, originally, Raynor was a tenant in common with them in the property, and when they assumed the exclusive possession of it under the transactions with him and the instruments in writing executed by him, adjudicated in the case of the *Colton Land and Water Company v. Raynor*, they held the apparent legal title to his interest in the common property in trust for him. This title, whether held by him or by them in trust for him, vested him with the right to his share in the property, and in the proceeds derived from it under the arrangement between the tenants in common as to the management and disposition of the property as adjudged in that case. The fact that the cotenants in exclusive possession cloaked themselves in the garb of a corporation,

and conveyed the property to themselves in the corporate name, did not divest Raynor of his rights. His cotenants were still, in the shape which they saw fit to assume, the trustees of his legal title; and that fiduciary relation continued to exist, binding them, in all their transactions with the property, to the observance and practice of good faith to their cotenant and *cestui que trust*. From the obligations of that relation they could not relieve themselves by any transfer of the property to themselves in the name of a corporation into which they changed themselves, nor by a transfer to any other person, who knew of the existing relation, nor by indirect and crooked attempts to acquire the trust property for themselves.

Nor did the judgment of the court in the case of the *Colton Land and Water Company v. Raynor* relieve them from their trust as to the plaintiff's title. That judgment established the trust, and decreed its performance; but before performance, and while proceedings were pending to revise the decree itself, they attempted to avoid performance by the acquisition of the trust property to themselves by means of the judgment and execution sale. Against such proceedings the plaintiff was entitled upon every principle of equity to be relieved.

There was no substantial error in overruling the demurrer to the complaint on the ground that the complaint did not contain facts sufficient to entitle the plaintiff to any relief, or that several causes of action were improperly united, or that Clyde and the Colton Water Company were improperly joined as defendants.

The complaint contains a voluminously specific statement of facts constituting the alleged frauds by which the defendants acquired to themselves title to the plaintiff's property. These acts of fraud, it is charged, were parts of one entire scheme to divest the plaintiff of his rights, and although numerous, they constitute but one cause of action, upon which plaintiff would be entitled to either alternative or discretionary relief. In this view Clyde and the Colton Land and Water Company were proper parties. Clyde was a proper party because he was one of the principal actors in so much of the alleged frauds, which were the basis of the plaintiff's action, by which the other defendants, through him, acquired the trust property. In the

investigation of the alleged frauds and the relief which might be decreed to the plaintiff, the judgment which Clyde recovered against Raynor, and through which the other defendants claimed Raynor's title, was directly challenged, and he had a right to be heard in any action or adjudication which might affect the validity of the judgment and the proceedings under it.

The Colton Land and Water Company was also a proper party, because the complaint alleged: "That the defendant, the Colton Land and Water Company, claims to have acquired some interest in said real property, under and by virtue of said deeds from said Clyde and said sheriff, adverse to the plaintiff, which claim is invalid and without foundation." It is a general rule that all parties interested in a controversy, or who may be affected by a decree rendered therein, should be made parties; all who are nominally or really interested may therefore be joined although the interests of all may not be affected alike by the relief which may be granted, and the court may in the final disposition of the case, dismiss as to some of them on the ground that they neither have nor claim any interest in the controversy. Upon the face of the complaint, both Clyde and the corporation were proper if not necessary parties to a complete determination and settlement of the questions involved in the controversy.

We see no prejudicial error in the record.

Judgment and order affirmed.

THORNTON, J., SHARPSTEIN, J., MCKINSTRY, J., and ROSS, J., concurred.

Rehearing denied.

[No. 9323. Department One.—June 24, 1885.]

MILTON T. LITTLE, APPELLANT, v. DAVID JACKS,
RESPONDENT.

NEW TRIAL—NOTICE OF INTENTION.—A notice of intentnon to vacate the judgment is not a notice of intention to move for a new trial. ID.—AMENDMENT OF NOTICE.—A notice so radically defective cannot be amended after the time allowed by statute for giving notice has expired.

APPEAL from an order of the Superior Court of Monterey County allowing the defendant to amend his notice of intention to move for a new trial.

The facts are stated in the opinion of the court.

D. M. Delmas, for Appellant.

S. S. Houghton, for Respondent.

ROSS, J. — It appears from the bill of exceptions in this cause that on January 9, 1884, the court made and filed its written findings of fact and conclusions of law, and entered its judgment thereon, of which defendant had due notice, on the same day. Within ten days thereafter defendant gave plaintiff notice of his intention to move the court to vacate and set aside the *judgment*. This was not a notice of intention to move for a new trial. (*Sawyer v. Sargent*, 65 Cal. 259; *Martin v. Matfield*, 49 Cal. 42.) The time allowed by statute for the giving of a notice of the latter character expired with the tenth day after the notice of the decision was given. To allow a notice filed within statutory time, but which was radically defective, to be amended after the expiration of that time would be in effect to extend the time allowed by statute for the giving of such notices, which the courts have no power to do.

Order reversed.

McKINSTRY, J., and McKEE, J., concurred.

Hearing in Bank denied.

[No. 8950. Department One.—June 24, 1885.]

THE PEOPLE EX REL. BOARD OF STATE HARBOR COMMISSIONERS, RESPONDENT, v. THE POTRERO AND BAY VIEW RAILROAD COMPANY, APPELLANT.

NAVIGABLE STREAM—STREET RAILROAD—IMPLIED GRANT OF RIGHT TO BUILD BRIDGE.—A grant by the legislature of the right to build a street railroad over a designated route which crosses a navigable stream, includes the right to build a bridge over the stream.

ID.—ACT ADMITTING CALIFORNIA INTO UNION—POWER OF STATE OVER NAVIGABLE STREAMS.—The provision of the act of Congress admitting California into the Union, which declares "that all navigable waters within the State shall be common highways and forever free," etc., does not impair the power of the State to authorize the construction of bridges over navigable streams.

ID.—POWER TO CONSTRUCT BRIDGE.—While the power of the State with respect to the construction, regulation, and control of bridges over navigable streams is subordinate to that of Congress, still until Congress acts on the subject the power of the State is plenary.

ID.—AUTHORIZED BRIDGE NOT A NUISANCE.—A bridge over a navigable stream, built in pursuance of a valid authorization from the State, cannot be adjudged a nuisance.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

McAllister & Bergin, for Appellant.

Under the law granting the franchise to Tompkins, his associates and assigns, they had authority to construct the bridge in question. (*Union Pacific R. R. v. Hall*, 1 Otto, 350; *People v. Saratoga & R. R. Co.* 15 Wend. 130; *Springfield v. Conn. R. R. Co.* 4 Cush. 63; *Mohawk Bridge Co. v. Utica & S. R. R. Co.*, 6 Paige, 554.) The State in the absence of congressional action, possessed plenary power to authorize the structure in question, and its action in authorizing the same is constitutional; and therefore the bridge cannot be adjudged a nuisance. (*Wilson v. Blackbird Creek Marsh Co.* 2 Peters, 250; *Veazie v. Moor*, 14 How. 573; *Passaic Bridge Case*, 3 Wall. 782; *Gilman v. Philadelphia*, 3 Wall. 713; *Clinton Bridge Case*, 10 Wall. 462; *U. S. v. New Bedford Bridge*, 1 Wood. & M. 49; *Griffin v. Gibb*, 1 McAll. 221; *County of Mobile v. Kimball*, 12 Otto, 691; *Caldwell v. Am. Bridge Co.* 113 U. S. 205.)

T. C. Coogan, and George D. Shadburne, for Respondent.

ROSS, J. — Action to abate an alleged nuisance, consisting of the maintenance by defendant of a bridge across Islais Creek, in the city and county of San Francisco, which impedes the navigation of the creek, the waters thereof being navigable. The defendant claims the right to maintain the bridge under a grant by the legislature made April 2, 1866, to one Tompkins, his associates and assigns, of the right to lay down, maintain, and operate a street railroad along a certain route and upon certain terms stated in the act, which is found in Statutes of 1865–66, p. 749. The route designated crosses Islais Creek, and as the road could not be built across the creek without a bridge, the grant of the right to build the road necessarily included a grant of the right to build the necessary bridge. (*Union Pac. R. R. Co. v. Hall*, 1 Otto, 350.) And that such was the understanding of the legislature is shown by the subsequent Act of March 28, 1868 (Stats. 1867–68, p. 475), amending the Act of April 2, 1866; for the fifth section of the amendatory act provides among other things that the company “shall be required to construct a draw in the bridge on Kentucky Street at its intersection with Tulare Street whenever the parties interested shall pay the expense of constructing such draw, and provide for maintaining the same.” And a similar provision is inserted in the act of the legislature passed March 26, 1868 (Stats. 1867–68, p. 357), declaring Islais Creek a navigable stream, the third section of which providing among other things that “nothing in this act shall be so construed as to affect the rights or franchise of the Potrero and Bay View Railroad Company (which company succeeded on July 23, 1867, to all the rights of Tompkins and his associates), or to require said company to make a draw on said bridge, unless the cost of said draw and the expense of maintaining the same, are provided by the interested parties who may desire such improvement.”

If the State had the constitutional power to authorize the building of the bridge in question, it would seem clear enough that action under its sanction cannot legally be adjudged a nuisance. But the ground chiefly relied on by counsel and upon which the court below seems to have held against the defendant

is that the act of the legislature granting the right is unconstitutional and void because of that provision of the act of Congress admitting California into the Union, which provides "that all the navigable waters within the State shall be common highways and forever free, as well to the inhabitants of said State as to the citizens of the United States, without any tax, impost, or duty therefor." (9 U. S. Stats. pp. 452, 453.) But this point is disposed of by the Supreme Court of the United States against the plaintiff in the recent case of *Cardwell v. American River Bridge Co.* 113 U. S. 205, in which it was held that the clause referred to in no way impaired the power which the State could exercise over the subject if the clause had no existence, but that its object was to insure a highway equally open to all, without preference to any, and unobstructed by duties or tolls, and thus prevent the use of the navigable streams by private parties to the exclusion of the public, and the exaction of any toll for their navigation; and that the cause contemplated no other restriction upon the power of the State in authorizing the construction of bridges over them whenever such construction would promote the convenience of the public. The act admitting California declares that she is "admitted into the Union on an equal footing with the original States in all respects whatever. She was not, therefore, shorn by the clause as to the navigable waters within her limits of any of the powers which the original States possessed over such waters within their limits." And the court reiterated what had before been held in many cases, that while the power of the State with respect to the construction, regulation, and control of bridges over navigable streams is subordinate to that of Congress, still until Congress acts on the subject, the power of the State is plenary. The case of *Caldwell* and others to which reference is there made is decisive of the point.

Judgment and order reversed and cause remanded.

MCKEE, J., and MCKINSTY, J., concurred.

[No. 8524. Department One.—June 25, 1885.]

LOUIS WEST, APPELLANT, v. VICTOR B. MASSON ET AL.,
RESPONDENTS.

DEED—BREACH OF COVENANT—GRANT, BARGAIN, AND SALE.—The defendants, by a deed of grant, bargain, and sale, conveyed certain land to the plaintiff, and expressly covenanted therein "to warrant and defend the premises against all persons lawfully claiming the same, by, through, or under them." At the time of the conveyance the grantor of the defendants was in possession of the premises, claiming that his deed to them, although absolute in form, was intended as a mortgage. He subsequently brought an action against the plaintiff and the defendants to redeem from such alleged mortgage. The plaintiff defended the action, and afterwards brought an action against him to recover possession of the premises. In both actions the plaintiff was successful. *Held*, that there had been no breach of either the express or implied covenants in the deed to the plaintiff.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Moses G. Cobb, for Appellant.

The case discloses an eviction by the defendants of the plaintiff from the premises conveyed; and consequently such a breach of the covenants in their deed as entitle the plaintiff to recover all that it cost him to regain possession. (Civ. Code, § 1113; *McGary v. Hastings*, 39 Cal. 360; *Prescott v. Trueman*, 4 Mass. 627; *Shearer v. Ranger*, 21 Pick. 448; *Bronson v. Coffin*, 108 Mass. 180; 3 Am. Dec. 246; *Delavergne v. Norris*, 7 Johns. 359; *Harlow v. Thomas*, 15 Pick. 68; *Brooks v. Moody*, 20 Pick. 476; *Norton v. Babcock*, 2 Met. 517; *Barnes v. Mott*, 64 N. Y. 402; *Harrington v. Murphy*, 109 Mass. 300.)

Loughborough & Newhall, for Respondents.

The assertion of title by the defendant's grantor, even if it had prevailed, was not a breach of the covenant. (*Bryan v. Swain*, 56 Cal. 616.)

McKEE, J.—On the 13th of May, 1877, the defendants, Francis P. and Victor B. Masson, sold, and by a deed of grant, bargained, and sale, conveyed to the plaintiff, Louis West, a tract

of land in Alameda County. Additional to the covenant implied from the terms "grant, bargain, and sale," the deed contained a covenant on the part of the grantors "to warrant and defend the premises against all persons lawfully claiming the same by, through, or under them, or either of them." When West acquired title from the defendants he was in possession of a small portion of the tract, as tenant of one William Schuman, from whom the defendants derived title, subject to the lease to West, and Schuman occupied the balance of the land. West knew when he purchased from the defendants, and before paying the purchase money and receiving his deed, that Schuman was in possession, nominally as a tenant at will of the Massons, but claiming that the deed by which he had transferred the title to them, though absolute in form, was intended as a mortgage to secure payment of a certain mortgage on the land in favor of the Massons; and for the foreclosure of which there was at the time of the execution of the deed by Schuman to them an action pending in their favor against Schuman, West, and others. Under these circumstances West purchased from the defendants and received and had recorded his deed.

Soon after the deed to West was recorded, Schuman tendered to the Massons money to redeem the land from what he claimed to be a mortgage to them, and demanded a reconveyance of the premises. They refused to accept the tender or to comply with the demand. A suit in equity was thereupon commenced by Schuman against the Massons and West, their grantee, to have the deed to the former declared a mortgage, and to compel the defendants in the action to reconvey the premises upon payment of what was due. West notified his co-defendants in the action to defend the suit, but they refused, and he had to defend it at his own expense, and afterward, at his own cost and expense, had to commence and prosecute an action of ejectment against Schuman to recover possession of the land. In both actions he was successful, and the object of the action in hand is to recover from the defendants the money expended by him in recovering from Schuman possession of the land which he purchased from them. For this, he contends, they are liable upon the covenants in the deed. But we think there was no breach of either the express or implied covenant in the deed to the plaintiff.

Schuman did not claim a paramount title to the land adverse to the defendants, as his grantees, nor a title "by, through, or under them, or either of them." He was in possession under them, asserting that the conveyance of the land which he had made to them, and under which they claimed to have derived their title from him, was a mortgage from which he had the right to redeem the land. The assertion of such a claim was not a breach of the defendant's covenant of warranty to the plaintiff. The plaintiff purchased with full knowledge of the claim, and took a conveyance of the land subject to it; any expenditures of money made in resisting it were, therefore, in defense of his own right, and no liability attached to the defendants by reason of their covenants in the conveyance to pay him therefor.

Judgment and order affirmed.

Ross, J., and McKINSTRY, J., concurred.

Hearing in Bank denied.

[No. 9809. Department One.—June 25, 1885.]

LIZZIE BUXTON ET AL., APPELLANTS, v. HATTIE TRAVER
ET AL., RESPONDENTS.

PUBLIC LANDS—OCCUPANT OF UNSURVEYED—PRE-EMPTION—DEATH OF OCCUPANT—RIGHT OF HEIRS.—A mere occupant of unsurveyed public lands of the United States, who has taken none of the steps required by law for its pre-emption, has a mere privilege of pre-emption. Such a privilege is not an estate legal or equitable in the land, and upon the death of the occupant it does not descend to his heirs, nor clothe them with an equitable right to control the patent to the land subsequently issued by the United States upon an entry made by another.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion of the court.

John H. Dickinson, for Appellants.

Curtis & Otis, for Respondents.

McKEE, J. — Appeal from a judgment of dismissal entered on sustaining a general demurrer to the complaint.

The complaint shows, that the plaintiffs are daughters and the defendant Hattie Traver the widow of Oscar Traver, deceased; that Oscar Traver died in the year 1877 in possession of the tract of land described in the complaint, leaving surviving him the said widow and two daughters as his sole heirs-at-law; that after his death, the widow continued to reside on the land, and in November, 1879, she made a homestead entry upon it, and on the 10th of November, 1879, obtained for it a patent from the United States. This patent the plaintiffs claim inures to the benefit of the heirs-at-law of the deceased; and the object of the suit in hand is to have the widow as the recipient of the United States patent declared their trustee of an undivided one-half interest in the land, and of the rents, issues, and profits of the same.

They base this claim upon section 2269 of the United States Revised Statutes, which is as follows: —

“Where a party entitled to claim the benefits of the pre-emption law dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned.”

Of the validity of this statute there is no question. (*Elliott v. Figg*, 59 Cal. 117.) But it has no reference to an entry made under the homestead laws of the United States; it refers only to an entry made in consummation of a claim of right to land, asserted under the pre-emption laws of the United States, by a pre-emptor, who dies before completing his claim, by filing the requisite papers. In such a case, the statute extends the right, after the death of the pre-emptor, to his executor or administrator, or any of his heirs-at-law, to complete the claim initiated by him, by filing the papers necessary for the purpose, and to enter the land for the benefit of all the heirs. But the complaint contains no case under the statute. Its statement of

facts shows: That the land patented to the defendant Hattie was, in the year 1870, part of the unsurveyed public land of the United States open to pre-emption; that Oscar Traver settled upon it that year with the intention of acquiring title thereto from the United States as soon as he could; that he was a duly qualified pre-emptor, and in that capacity, resided on the land with his family, consisting of the plaintiffs and the defendant Hattie, until his death in 1877; that he died without leaving a last will, and there was no administration of his estate; and it appears that neither the widow nor the plaintiffs, nor either of them, after his death suggested or presented any claim initiated by him, or filed any papers for the purpose of completing such a claim if it existed, or took any steps for the entry of the land under the pre-emption laws for the benefit of the heirs. It is alleged, however, that the widow continued to occupy the land after his death, and it is charged that it was her duty to complete the pre-emption of the deceased, and enter the land for the benefit of the heirs. That she did not perform that duty, but instead fraudulently communicated to the plaintiffs as fact that their father died without leaving any property, and thus prevented them from establishing their father's claim by the requisite proof, and then entered the land in her own name and for her own behoof.

There is no averment in the complaint that the fact communicated to the plaintiffs was not true; and it is admitted that the approved plat of the township, on which the land is situated, was not filed until the 1st of July, 1879, more than two years after the death of Oscar Traver. At the time of his death Traver was, therefore, a mere occupant of the land, as a portion of the unsurveyed public land of the United States, for the pre-emption of which he had taken no steps required by the pre-emption law. In that position he had a mere privilege of pre-emption. But such a privilege is not a title legal or equitable; it is only a proffer to a certain class of persons that they may become purchasers if they will, but without payment, or an offer to pay, it confers no equity; a right is conferred by it only when the party has accepted the offer, by claiming the benefit of the statute in the proper manner and within the required time, or by payment. (*Grand Gulf R. R. Co. v.*

Bryan, 8 Smedes & M. 268; *Hutton v. Frisbie*, 37 Cal. 475; *Frisbie v. Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77.) Until there is an offer to do what the pre-emption laws require to be done to initiate and prosecute a pre-emption right, there is no existing claim of the settler to pre-empt, which can be completed after his death by his heirs or his administrator; and as no such claim was initiated and prosecuted by him in his lifetime, he acquired no proprietary interest in the land, which upon his death would descend to his heirs, and clothe them with an equitable right to control the patent to the land subsequently issued by the United States upon an entry made by another.

As, therefore, the original settler died without making any claim to the benefits of the pre-emption laws, which could be perfected by his heirs, and as no equitable right in the land descended to the heirs, the patent issued to the defendant Hattie, upon her entry under the homestead laws, is not subject to a trust in favor of the plaintiffs (*Jarvis v. Hoffman*, 43 Cal. 314), and the court did not err in sustaining the demurrer, and entering judgment for defendants.

Judgment affirmed.

ROSS, J., and MCKINSTY, J., concurred.

[No. 9937. Department One.—June 26, 1885.]

J. W. SALLEE, APPELLANT, v. L. T. CORDER,
RESPONDENT.

DESERT LAND—ENTRY—RIGHT OF POSSESSION.—Desert land duly entered under the Act of Congress of March 3, 1877, and on which twenty-five cents per acre has been paid, is reserved from entry under other laws, and the intended purchaser has the right of possession for three years from the date of his entry.

APPEAL from a judgment of the Superior Court of the county of San Bernardino.

The action was brought to recover possession of the northwest quarter of section 6, township 1 south, range 6 west of San Bernardino base and meridian. The plaintiff on the 15th of

April, 1882, had entered the land in controversy under and in compliance with the Act of Congress of March 3, 1877, entitled "an act to provide for the sale of desert lands in certain States and Territories," made valuable improvements thereon, and continued in the occupation thereof until ousted by the defendant. On the trial in addition to the above facts, the plaintiff gave evidence that the books in the United States land office showed a memoranda dated the 16th of June, 1884, giving a notice of contest by the defendant of the plaintiff's claim to the land in dispute and rested. Thereupon the defendant moved for a nonsuit, which was granted by the court.

Hight & Fording, for Appellant.

Plaintiff was entitled to the possession of the land in controversy for the period of three years from the date of his entry. (Desert Land Act of March 3, 1877; Code Civ. Proc. § 1925.) Plaintiff's certificate of purchase established a *prima facie* case for him. (*Sacramento Savings Bank v. Hynes*, 50 Cal. 195.)

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J. D. Bethune, and *W. A. Harris*, for Respondent.

The COURT. — The case shows that the section of land, part of which is demanded in this action, was "duly entered by plaintiff as desert land on the 15th of April, 1882, and twenty-five cents per acre paid thereon by plaintiff to the United States government for each and every acre of said section." Land thus entered under the act "to provide for the sale of desert lands," etc. (Supplement to Rev. Stats. U. S. 1874-1881, p. 289, ch. 107), is reserved from entry under other laws, and gives the right of possession for three years to the proposed purchaser. The plaintiff herein was, therefore, entitled to recover. The fact that defendant, after the commencement of this action, claimed (as appears from a memorandum upon the books of the "United State land office at Los Angeles") a portion of the land as a pre-emptor constituted no defense.

Judgment reversed and cause remanded for a new trial.

[No. 8849. Department Two.—June 29, 1885.]

CATHERINE REYNOLDS, RESPONDENT, v. JOHN
REYNOLDS, APPELLANT.

DIVORCE—CONDONATION—DISMISSAL OF ACTION—PAYMENT OF WIFE'S COUNSEL FEES.—If, pending an action for divorce, the parties thereto admit a condonation, and ask that the action be dismissed, the court should order a dismissal, and thereafter the husband cannot be compelled to pay the counsel fees of the wife.

APPEAL—MODIFICATION OF JUDGMENT BY TRIAL COURT—BILL OF EXCEPTIONS.—After a case has been appealed, the trial court has no power to so change the judgment appealed from as in effect to prevent the review of alleged errors brought up by a bill of exceptions.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts appear in the opinion of the court.

Langhorne & Miller, for Appellant.

The allowance of counsel fees for the wife was erroneous because the application therefor was made too late. (*Persons v. Persons*, 7 Humph. 183; *Tiffin v. Tiffin*, 2 Binn. 202; *Wallingsford v. Wallingsford*, 6 Har. & J. 485; *Lockridge v. Lockridge*, 3 Dana, 28; *Newman v. Newman*, 69 Ill. 169; *McCulloch v. Murphy*, 45 Ill. 258.)

J. D. Sullivan, and *D. H. Whittemore*, for Respondent.

MYRICK, J. — Appeal from that portion of a judgment in a divorce suit which adjudges the payment of counsel fees. The amended pleadings were in and issues joined October 18, 1882. On the 11th of November, 1882, an order was filed which directed the defendant to show cause on the 13th of the same month why he should not pay to the attorneys for the plaintiff \$2,000 as counsel fees. On the said 11th of November both the parties (husband and wife) signed a paper reading thus: "We, the parties to the above entitled action, having condoned each other's offenses, voluntarily abandon said action, and ask that the same be dismissed." At the hearing on the 13th of November, after affidavits on behalf of plaintiff's attorneys had been read, the paper above referred to was read together with

the affidavit of plaintiff, in which she stated that in October, 1882, she and her husband mutually condoned with each other's alleged offenses, and ever since October 23d had been living and cohabiting together peaceably, quietly, and happily as man and wife, and intended to so continue for the remainder of their natural lives, and that she then and there, during trial and before final submission, abandoned the case and asked that the same be dismissed. Thereupon the court, on the 15th of December, 1882, made an order awarding to said Sullivan and Whittemore \$1,000 as counsel fees; and on the 9th of January, 1883, the court rendered its judgment in which, after adjudging that plaintiff had condoned and forgiven the alleged offenses of defendant, and abandoned the case, adjudged and decreed that the defendant pay to the plaintiff's attorneys, J. D. Sullivan and D. H. Whittemore, \$1,000 counsel fees, and that the action be dismissed.

That part of the decree which directed the payment of counsel fees was erroneous. On the 23d of October the alleged offenses of defendant were condoned; and both parties asked that the action be dismissed; therefore so long as the condition which the law implies, viz., subsequent kindness, continued, the plaintiff had no cause of action, or occasion for the service of counsel in that regard. When the husband and wife forgave and were forgiven, and abandoned their criminations and recriminations, the attorneys had but to gather up their briefs and retire. The court should at once have dismissed the case and made no further order in it. (*McCulloch v. Murphy*, 45 Ill. 258; *Newman v. Newman*, 69 Ill. 169; *Persons v. Persons*, 7 Humph. 183.)

Section 137 of the Civil Code authorizes the court to require during the pendency of the action, the payment by the husband of any money necessary for the prosecution of the action. When the wife (plaintiff) in open court admits condonation and asks that the action be dismissed, as she no longer has an action to be prosecuted, it is not necessary that any money be paid for its prosecution.

As the above disposes of the case, we omit to express opinion on two other points presented, viz: The effect, on the right to have counsel fees allowed, of an agreement between plaintiff and her attorney that the latter have as compensation for his ser-

vices a share of the property ultimately recovered, and whether the order should have been that the amount be paid to the plaintiff in person rather than to the attorneys.

There is on file in this case a certified copy of a paper filed after the case was heard in this court, purporting to be an order of the court below, from which it appears that after the appeal was taken, the court below, in making such order, recited that the judgment from which the appeal was taken did not speak the truth, and corrected the judgment. In the judgment as thus attempted to be corrected, nothing appears regarding the payment of counsel fees, the portion of the judgment relating to counsel fees being omitted. In deciding this case we disregard this paper. A bill of exceptions comes up with the record, presenting some of the matters hereinbefore stated. If we were to consider the judgment as attempted to be amended, the appellant would be prevented from having the benefit of his exceptions. After a case has been appealed, we do not think the court below has power to so change the judgment appealed from as in effect to prevent the review of alleged errors brought up by bill of exceptions.

The judgment so far as appealed from is reversed.

ROSS, J., and THORNTON, J., concurred.

Hearing in Bank denied.

[No. 8767. Department Two.—June 29, 1885.]

HIBERNIA SAVINGS AND LOAN SOCIETY, RESPONDENT, v. JOHN J. CONLIN ET AL., APPELLANTS.

ESTATE OF DECEASED PERSON—PRESENTATION OF CLAIMS.—Only such claims are required to be presented to the personal representative of a deceased person as when allowed will rank among the acknowledged debts of the estate to be paid in due course of administration.

ID.—MORTGAGE TO SECURE DEBT OF ANOTHER—STATUTE OF LIMITATIONS.—Where a mortgage is given to secure the debt of a third person, and the mortgagor afterwards dies, the claim arising on the mortgage is not required to be presented to his personal representative, nor will its presentation and allowance affect the running of the Statute of Limitations against the mortgage.

ID.—ACCRUING OF CAUSE OF ACTION.—The doctrine of *Tyman v. Walker*, 35 Cal. 634, that the accruing of the cause of action and the

running of the Statute of Limitations do not depend upon the existence of a person competent to sue, applied to the present case, the mortgagor having died before the mortgage debt became due.

1D.—JUDGMENT FOR TAXES AND INSURANCE—PLEADING.—In an action to foreclose a mortgage, the judgment should not include the amount of taxes and insurance paid by the mortgagee on the mortgaged property, unless the complaint alleges their payment.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

John M. Chretien, Mich. Mullaney, and Eugene N. Deuprey,
for Appellants.

Tobin & Tobin, for Respondent.

THORNTON, J. — Action to foreclose a mortgage executed by Catherine M. Conlin on her separate real property to the plaintiff to secure the note of the defendant, John J. Conlin, her husband. The note above mentioned was for \$500, with interest at the rate of nine per cent per annum, bore date September 13, 1873, and was payable in twenty-four equal instalments of \$22.84 each, the first instalment to be paid one month after date, and another instalment each month thereafter, until all were paid. The above given terms of the note in the view taken of this cause herein are alone material.

Catherine M. Conlin died testate on the 28th of November, 1873, and on the 8th day of January, 1874, M. C. Smith was duly appointed executor thereof. On the 6th of August, 1875, plaintiff presented its claim, duly verified, for the amount due upon said note and mortgage, to said executor, and which was by him allowed.

It is also found that the claim was, on the 7th day of August, 1875, presented to the judge of the Probate Court, by him approved, and thereafter filed with the clerk of the Probate Court.

The above facts are found by the court.

The material question in the case arises on the defense of the Statute of Limitations.

We are of opinion that no presentation of the claim arising on the mortgage made by Mrs. Conlin was required by law.

We find nothing in the statute on the subject of the presentation of claims against the estates of deceased persons, which calls for any such presentation. Only such claims are required to be presented as when allowed will rank among the acknowledged debts of the estate, to be paid in due course of administration. (Code Civ. Proc. § 1497.) Mrs. Conlin owed no debt to the plaintiff. She only conveyed her property in mortgage to secure the payment of the debt of another. No action to recover any indebtedness could have been maintained against her in her lifetime, should any interest due on the note of her husband have fallen due and remained unpaid. Section 1500 of the Code of Civil Procedure does not apply to this case, for the reason that there could be no recourse under any circumstances against *any other property* of the estate of Mrs. Conlin than that mentioned in the complaint. This is true of every form in which this section has been enacted, since the Codes went into effect.

It was manifestly the intention of the section last referred to as it was first adopted and as it was re-enacted in 1876, to give the holder of the mortgage where he held a claim against the estate secured by it which when allowed would rank with the acknowledged debts of the estate, an election to present the claim for allowance, have it allowed and proceed to foreclose for the whole amount due on the claim, including any deficiency arising on a sale of the mortgaged premises, or to present no claim and sue on the mortgage alone, and obtain whatever might be realized on a sale of the mortgaged premises under the decree of foreclosure.

As the mortgage was not required to be presented, its presentation and allowance did not affect the question as to the Statute of Limitations.

In *Tynan v. Walker*, 35 Cal. 634, it was held that where no cause of action accrued to a person in his lifetime, but did accrue after his death, the Statute of Limitations began to run at the date of the accrual though there was no person in existence competent to sue, and continued to run from such date without cessation. The court in the case cited disapproved of the judgment in *Murray v. The East India Company*, 5 Barn. & Ald. 204, which had been followed by the highest court of several of our sister States. (See cases cited in opinion, 35 Cal. 638.)

The court further held in the same case that the twenty-fourth section of the Statute of Limitations then in force, did not apply to a case where the cause of action has not accrued to a person in his lifetime.

The case of *Tynan v. Walker* will be seen, on examining it, was that of a cause of action accruing after the death of the person who would, if he had survived the accrual, been plaintiff in the action. The case here is one where the action would have been against a person (Mrs. Conlin) as defendant, if she had lived until the cause of action came into existence. We see no other difference in the cases, and the reasoning in *Tynan v. Walker*, which met the approval of the court in that case, and the conclusions there reached, apply here. Section 24 of the act of limitations, upon which the ruling in *Tynan v. Walker* was made, is the same as regards the case under consideration as § 353 of the Code of Civil Procedure, the only change made by this section being the substitution of the word "representatives" in the latter clause of the section for the words "executors or administrators" in section 24 of the act, which is not material here. In accordance with the ruling in *Tynan v. Walker*, we must hold that as soon as each one of the instalments became due the statute commenced to run on the mortgage, and from that time continued to run.

This action was commenced on the 26th of November, 1880. The last instalment fell due on the 13th of September, 1875.

The period of limitation, which is four years, expired either on the 13th or 14th of September, 1879. It follows from this that the cause of action on the mortgage was barred when this suit was brought.

Sichel v. Carrillo, 42 Cal. 505, relied on by plaintiff, affords no support to its contention that the statute required the mortgage in this case to be presented. The remark in the opinion quoted by counsel for plaintiff is made upon a concession for the sake of the argument, viz., that the statute required the presentation of the mortgage of Mrs. Carrillo, and the learned judge who drew up the opinion intended only to say that conceding the mortgage was a claim which should have been presented under the statute, it would only be necessary to present it to the administrator of Mrs. Carrillo, and not to the administrator of

her deceased husband. This was said in refutation of the contention that it was necessary to present to the administrator of the deceased husband, which was alone contended for in the case.

The finding as to taxes and insurance paid by the plaintiff is outside any issue in the cause. There is no allegation in the complaint as to these matters. The defendants have had no opportunity to take issue as to these payments. Under these circumstances it was error to find as to them and render judgment for the amount found to have been paid.

Inasmuch as the court finds that the payment of taxes and insurance was authorized by the mortgage, and by the terms of it became a part of the amount due thereon, the judgment will be reversed and the cause remanded, that the question as to these payments may be regularly brought into the case by amendment and tried. As the cause will go back for a new trial in conformity with this opinion, nothing need be said as to counsel fees, which may or may not be allowed on a future trial.

Judgment reversed and cause remanded for a new trial.

SHARPSTEIN, J., and MYRICK, J., concurred.

[No. 9981. In Bank.—June 29, 1885.]

WILLIAM G. BURKE, APPELLANT, v. WILLIAM M. EDGAR,
RESPONDENT.

PUBLIC OFFICER—DEPUTY COUNTY CLERK OF SAN FRANCISCO—SALARY.

—The salary of a court-room and register clerk of the Superior Court of the city and county of San Francisco is fixed at \$175 per month, by the Acts of February 13, 1880, and of April 2, 1880.

ID.—MANDAMUS—COURT-ROOM CLERK—APPOINTMENT MUST BE ALLEGED.—In a proceeding for a writ of mandate brought by a deputy of the county clerk of the city and county of San Francisco to compel the auditor to allow his claim for salary as a court-room or register clerk, the petition must allege and the court must find that the petitioner had been appointed or assigned to such position. An allegation that he had acted in the capacity and performed the services of a court-room or register clerk is not sufficient.

ID.—DE FACTO OFFICER CANNOT RECOVER SALARY.—A *de facto* officer cannot recover the salary annexed to the office as the salary is incident to the title to the office and not to its occupation and exercise.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Dunne & Davidson, and *Joseph J. Dunne*, for Appellant.

Petitioner and his assignors having acted in the capacity and performed the services as court-room and register clerks, it will be presumed they did so by regular appointment. (*Carter v. Sympton*, 8 Mon. B. 155; *Allen v. State*, 21 Ga. 219; 1 Greenleaf on Ev. § 92; Code Civ. Proc. § 1963, subd. 14.)

John L. Love, for Respondent.

THORNTON, J. — Application for a writ of mandate to be issued to defendant as auditor of the city and county of San Francisco, to compel him as such auditor to allow the claims of petitioner and his assignors for balance of salaries alleged to be due them as deputy clerks of the clerk of the city and county above mentioned. It is alleged of some of these deputies that they severally performed services as deputy in the capacity of court-room clerk in a department of the Superior Court of the city and county aforesaid, and of others of them the same allegation is made of them severally as register clerk. It appears that each of them has received from the auditor a warrant for \$150, in discharge of his salary as deputy, which has been regularly paid by the treasurer of the said city and county.

It is claimed and the court below so held that the salary of a court-room or register clerk is fixed by law at \$175 per month. It should be stated here that the salary of the other deputies of the county clerk is fixed at \$150 per month or less, and that the claim in question in this case is for the difference of \$25 per month between the \$150 paid as above stated, and the \$175 per month at which the salary was fixed.

We think that the salary of a court-room and of a register clerk is fixed by the acts of the legislature passed on the 13th of February, 1880, and April 2, 1880, at \$175 per month. (Stats. 1880, 5, 20. See also Act of February 5, 1872, Stats. 1871-72, 76.)

In the view taken of this case, the constitutionality of the Acts of 1880 above cited, may be conceded without deciding the point.

It is nowhere averred nor is it found that the petitioner or his assignors were appointed or assigned to the position of court-

room or register clerks. The Act of April 5, 1880, authorizes the county clerk to assign to a deputy duties in or in connection with the Superior Court of his county, or city and county.

The finding that each of the parties referred to, acted in the capacity and only performed services as the court-room clerk of a department, or as the register clerk of a department of the Superior Court, is not a finding that they and each of them were assigned. It is at most a finding of evidence, and not of the fact of assignment. Facts and not evidence should be found. Especially should the fact of assignment be found where the evidence as it appears in the finding is consistent with the fact that they acted in such capacity and performed the services stated without any such assignment. It is consistent with the finding as made, that each of the parties were *de facto* officers, and it is well settled in this State that a *de facto* officer cannot recover the compensation or salary annexed to such office; that such salary is "incident to the title to the office and not to its occupation and exercise." (*Dorsey v. Smyth*, 28 Cal. 21; *Stratton v. Oulton*, 28 Cal. 44; *People v. Potter*, 63 Cal. 127.)

Conceding that the presumption invoked by appellant stated in section 1963, subd. 14, of the Code of Civil Procedure applies here, still the fact of assignment should be found. But we are of opinion that such presumption does not apply to the case of an officer prosecuting an action to recover his salary. In such case he must establish his title by proof of an appointment made as required by law. (See cases just above referred to, and *People v. Hopson*, 1 Denio, 579, and cases there cited.)

This is not a case in which the judgment should be reversed and the cause remanded for a new trial for want of a finding upon a material issue, as no issue was joined on the main question in the cause, viz., that of an assignment by the county clerk to the positions above referred to.

The views above expressed are conclusive of the case, and it is therefore unnecessary to pass on the other questions discussed herein.

The judgment and order should be affirmed, and it is ordered accordingly.

SHARPSTEIN. J. ROSS, J., MYRICK, J., and MCKINSTRY, J., concurred.

[No. 9984. In Bank.—June 29, 1885.]

SARAH ALTHEA SHARON, RESPONDENT, v. WILLIAM SHARON, APPELLANT.

DIVORCE—ACTION IN EQUITY—SUPREME COURT—JURISDICTION.—An action for divorce is a case in equity within the meaning of the clause of the Constitution conferring appellate jurisdiction on the Supreme Court.

ID.—ACTION TO ESTABLISH MARRIAGE.—An action brought under section 78 of the Civil Code for the purpose of determining the validity of a disputed marriage is in its nature a suit in equity, and from the judgment therein an appeal lies to the Supreme Court.

ID.—ORDER FOR ALIMONY AND COUNSEL FEES APPEALABLE—FINAL JUDGMENT.—In an action for divorce, an order made *pendente lite*, for the payment by the husband to the wife of temporary alimony and counsel fees, is in effect a final judgment, and therefore appealable. Such an order cannot be reviewed on an appeal from the judgment decreeing a divorce.

ID.—STAYING PROCEEDINGS ON ORDER—SUFFICIENCY OF UNDERTAKING.—The order required the defendant to pay to the plaintiff, on or before the 9th day of March, 1885, the sum of \$7,500 as alimony, and thereafter the sum of \$2,500 monthly, until the further order of the court; it also required the defendant to pay the sum of \$55,000 as counsel fees. On appeal from the order, the defendant filed an undertaking to stay proceedings in the sum of \$305,000, being double the amount of the gross sums allowed for alimony and counsel fees, and double the amount of the monthly payments for the period of three years, assumed to be the period during which the appeal would probably be pending. *Held*, that the undertaking was sufficient to stay proceedings on the order pending the appeal.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order awarding alimony and counsel fees.

The action was brought to obtain a decree declaring a marriage to exist between the appellant and the respondent, and for a divorce. Judgment was rendered in favor of the plaintiff establishing the validity of the marriage, and granting her a divorce. Prior to such judgment the trial court made an order requiring the defendant to pay to the plaintiff alimony and counsel fees. The terms of this order are stated in the last head-note. From the judgment decreeing a divorce and from this order the defendant appealed, and subsequently obtained from the Supreme Court an order to show cause why the proceedings upon the order for the payment of alimony and counsel fees should not be stayed pending the appeal. The respondent thereupon moved to dismiss the appeal both from the judgment and the order. The further facts are stated in

the opinion of the court, and in the dissenting opinion of MR. JUSTICE MCKEE.

Stewart & Herrin, for Appellant.

An action for a divorce is a case in equity within the meaning of the Constitution of 1879, as well as under the prior Constitution. The Supreme Court has, consequently, jurisdiction of an appeal from a judgment rendered therein. (*Lyons v. Lyons*, 18 Cal. 448; *Hyatt v. Allen*, 54 Cal. 353; *Palache v. Hunt*, 64 Cal. 473; *Brock v. Bruce*, 5 Cal. 279; *People v. Mier*, 24 Cal. 61; *Mahlstadt v. Blanc*, 34 Cal. 577; 1 Pomeroy's Eq. Jur. §§ 112, 171; *Courtwright v. Bear R. W. & M. Co.* 30 Cal. 573, 585.) The order granting alimony and counsel fees is reviewable on a direct appeal therefrom. Such order is in the nature of a final judgment. (*Blake v. Blake*, 80 Ill. 523; *Foss v. Foss*, 100 Ill. 576; *Hecht v. Hecht*, 28 Ark. 92; *Casteel v. Casteel*, 38 Ark. 477; *Lochnane v. Lochnane*, 78 Ky. 467; *Golding v. Golding*, 74 Mo. 123; *Adams v. Woods*, 18 Cal. 31; *Lewis v. Campau*, 14 Mich. 458; *Barry v. Briggs*, 22 Mich. 201; *Smith v. Walker*, 22 N. W. Rep. 267; *Thompson v. McKim*, 6 Har. & J. 302; *Hagthorp v. Hook*, 1 Gill & J. 270; *Williamson v. Carnan*, 1 Gill & J. 184; *Ware v. Richardson*, 3 Md. 505; *Tucker v. Yell*, 25 Ark. 420; *Forgay v. Conrad*, 6 How. 201; *Craighead v. Wilson*, 18 How. 199; *Bronson v. Railroad Co.* 2 Black, 524; *Thomson v. Dean*, 7 Wall. 342; *Trustees v. Greenough*, 105 U. S. 527; *Chicago & V. R. R. Co. v. Fosdick*, 106 U. S. 47.)

W. H. L. Barnes, *F. G. Newlands*, and *O. P. Evans*, also for Appellant.

Tyler & Tyler, *D. S. Terry*, *Flournoy*, *Mhoon & Flournoy*, and *Walter H. Levy*, for Respondent.

No appeal lies from the order awarding alimony and counsel fees. (Code Civ. Proc. § 939; *Call v. Call*, 65 Me. 407; *Russell v. Russell*, 69 Me. 338; *Cooper v. Mayhew*, 40 Mich. 528; *Sparhawk v. Sparhawk*, 120 Mass. 390; *Ross v. Ross*, 47 Mich. 186; *Gordon v. Gordon*, 88 N. C. 53; *Earles v. Earles*, 26 Kan. 178; *Webber v. Webber*, 79 N. C. 572; *Mangles v.*

Mangles, 6 Mo. App. 481; *Jenkins v. Jenkins*, 91 Ill. 167; *Lishey v. Lishey*, 6 Tenn. 418; *Richardson v. Curtis*, 2 Gray, 497; *Adams v. Hampton*, 13 Gray, 439; *Williams v. Hadley*, 19 Pick. 379; *Tenly v. Mahony*, 21 Pick. 212.) An action for a divorce is not a case in equity under the Constitution of 1879, and the Supreme Court has no appellate jurisdiction therein. (*Conant v. Conant*, 10 Cal. 249; *Knowles v. Yates*, 31 Cal. 82; Const. of 1879, §§ 4, 5, art. vi.; *Houghton's Appeal*, 42 Cal. 65; *Bizler's Appeal*, 59 Cal. 550; Bishop on Marriage and Divorce, § 71; *Perry v. Perry*, 2 Paige, 501; *Burtis v. Burtis*, 1 Hopk. Ch. 628; *Williams v. Williams*, 1 Johns. Ch. 488; *Whitmore v. Whitmore*, 4 Johns. Ch. 343; *Barbour v. Barbour*, 21 How. 582; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.)

SHARPSTEIN, J. — The order to show cause why all proceedings upon the order of the court below for the payment of alimony and counsel fees should not be staid, pending the appeals from the order and judgment, and the motions to have said appeals dismissed, devolve upon us the consideration and determination of the following questions:—

1. Has this court appellate jurisdiction in actions of divorce?
2. Can the order for the payment of alimony and counsel fees be reviewed on an appeal from the judgment?
3. Can this court entertain jurisdiction of the direct appeal from that order?

Although this court has, during a period almost coeval with its existence, heard and determined appeals in divorce cases, its jurisdiction to do so has not until now been sharply challenged. In *Conant v. Conant*, 10 Cal. 250, the appellate jurisdiction was disputed only in cases in which no question of property was involved. With that exception, the complete appellate jurisdiction of this court in such cases appears to have been uniformly acquiesced in.

The first Constitution conferred appellate jurisdiction on this court in all cases in which the matter in dispute exceeded \$200; the next, "in all cases in equity," and the present Constitution likewise confers appellate jurisdiction on this court "in all cases in equity." Appellate jurisdiction in other enumerated cases was and is conferred, but the jurisdiction of this court of an

action of divorce, in our opinion, depends on its being, in this State, at least, a case "in equity." The first Constitution prohibited the granting of divorces by the legislature, but did not confer the power to grant them on any court, unless the conferring of "jurisdiction in law and equity in all civil cases," on the District Courts, conferred it on those courts. And in the earliest reported case of divorce to which our attention has been directed, the first pleading on the part of the plaintiff is denominated, in the opinion of the court, "a bill filed for a divorce." (*Kashaw v. Kashaw*, 3 Cal. 312.) And in *Fuller v. Fuller*, 17 Cal. 605, the court denominates the complaint "a bill for divorce." There was then, as now, but one form of civil actions in this State, and the first pleading on the part of the plaintiff was then, as now, "a complaint." In equity cases, however, but in none other, so far as we are advised, the courts of this State sometimes, and not infrequently, refer to the first pleading on the part of the plaintiff as "a bill."

Under the first Constitution, as before stated, the appellate jurisdiction of this court embraced all cases, when the matter in dispute exceeded \$200. No distinction was made between cases in equity and at law. But in *Conant v. Conant*, 10 Cal. 249, this was construed to mean what is clearly expressed in subsequent Constitutions, viz., "appellate jurisdiction in all cases in equity," and in certain enumerated cases at law. The court, Field, J., delivering the opinion, said: "It never could have been the intention of the framers of the Constitution to deny to the higher courts both original and appellate jurisdiction in that large class of cases where the relief sought is not susceptible of pecuniary estimation."

In *Lyons v. Lyons*, 18 Cal. 447, the court filed no findings of fact or conclusion of law, and it was contended by the appellant's counsel that it constituted a sufficient ground for the reversal of the judgment. But this court, Cope, J., delivering the opinion, said: "*This is a suit in equity*, and the only error assigned is that there are no findings to support the judgment." He then cites *Walker v. Sedgwick*, 5 Cal. 192, in which it was held that the statute which required findings to be filed did not apply to cases in equity.

These cases all arose and were decided before any change had

been made in the original Constitution. And when revised it clearly expressed what it had before been construed to mean. From the time of that revision down to the date of the adoption of the present Constitution this court entertained appeals in divorce cases, and its jurisdiction to do so does not appear to have been questioned. And we are bound to presume that when the framers of the present Constitution literally copied from the late Constitution the clause defining appellate jurisdiction of this court in cases in equity, they knew how it had been construed, and intended that it should thereafter be construed as it theretofore had been. "It is a safe rule of construction that, when framing the organic law of the State, the convention thought proper to borrow provisions from the Constitutions of other States, which provisions had already received a judicial construction, they adopted the provisions in view of such construction and acquiesced in its correctness." (*People v. Coleman*, 4 Cal. 46.) *A fortiori*, when a clause in an earlier Constitution, after having received a judicial construction, is copied into a later one of the same State.

It is, however, contended, that while there is no difference between the clauses of the late and present Constitutions, which define the appellate jurisdiction of this court in equity cases, its jurisdiction in divorce cases, if it ever had any, is taken away by the clause in the present Constitution which defines the jurisdiction of Superior Courts, and which expressly confers on them original jurisdiction "in actions of divorce."

In support of that theory it is said that the common law of England prevails here, except so far as it is superseded or modified by some statute or fundamental law of our own, and that at common law no court could grant a divorce *a vinculo*, Parliament alone having that power. Therefore it is claimed that no court, in the absence of some statutory or constitutional provision expressly conferring that jurisdiction upon it, can exercise original or appellate jurisdiction in divorce cases; that in analogy to the procedure in England the legislatures of the several States of the United States, in the absence of any statutory or constitutional provision on the subject, would possess the exclusive power to grant divorces *a vinculo*, in their respective States; and that this gives great significance to the action of

the late constitutional convention, in conferring upon Superior Courts original jurisdiction of actions "of divorce," *eo nomine*, and in omitting any express mention of them in the clause which defines the jurisdiction of this court. The effect claimed for this is that it confers on the Superior Courts a jurisdiction which their predecessors the District Courts exercised under constitutions which did not expressly confer on them jurisdiction in divorce cases; and deprives this court of a jurisdiction which it exercised unchallenged for fifteen years, basing its right to do so upon a constitutional provision, of which a literal copy may be found in the present Constitution.

It is true that divorces *a vinculo matrimonii* in Great Britain were, at least for a long time prior to 1858, granted by act of Parliament exclusively; but it is not quite so clear that such divorces were not at one time granted by the High Court of Chancery, which borrowed its jurisdiction from the *æquitas* and judicial powers of the Roman magistrates. In *Wightman v. Wightman*, 4 Johns. Ch. 343, Chancellor Kent says: "All matrimonial and other causes of ecclesiastical cognizance belonged originally to the temporal courts (*vide* the case of *Legitimation and Bastardy*, Sir J. Davis' Rep. 240, and his argument in the case of *Præmunire*, 273); and when the spiritual courts cease, the cognizance of such causes would seem as of course to revert to the *lay* tribunals." From the argument in the *Præmunire* case above cited we extract the following paragraph:—

"First, then, let us see when this distinction of ecclesiastical or spiritual causes from civil and temporal causes did first begin in point of jurisdiction. Assuredly for the space of 300 years after Christ this distinction was not known or heard of in the Christian world. For the causes of testaments, of matrimony, of bastardy, and adultery and the rest, which are called ecclesiastical or spiritual causes, were merely civil and determined by the rules of the civil law, and subject only to the jurisdiction of the civil magistrate as all civilians will testify with me."

Gibbon says: "The magistrates of Justinian were not subject to the authority of the church; the emperor consulted the unbelieving civilians of antiquity; and the choice of matrimonial laws in the Code and Pandects is directed by the earthly motives of justice, policy, and the natural freedom of both sexes."

It is clear, therefore, that in Roman jurisprudence divorce cases were heard and determined by the civil magistrates, who had jurisdiction of cases both at law and in equity as we now distinguish them.

"In the reign of Richard II., the barons formally declared that they would not suffer the kingdom to be governed by the Roman law; and the common-law judges prohibited it from being any longer cited in their courts. This action was certainly a mistake, and it produced an opposite effect from the one intended. *The Roman law instead of being banished was simply transferred to another court which was not governed by common-law doctrines.* As the law courts cut themselves off from all opportunity of borrowing equitable principles from this foreign source, the necessity arose for a separate tribunal in which those principles could be recognized. It therefore followed immediately upon this prohibition that the hitherto narrow jurisdiction of the Court of Chancery was greatly increased, and extended over subject-matters which required an ample and constant use of Roman law doctrines." (1 Pomeroy's Eq. 20.) It would not necessarily follow from this that the Court of Chancery succeeded to all the powers of the Roman magistrates, except those which the common-law courts were administering; but it does seem to us that the Court of Chancery might, unless prohibited by act of Parliament, have exercised jurisdiction in matrimonial as well as in other causes. And there is some evidence of its having done so. "Tothill, in his transactions of the Court of Chancery, states that there are on the rolls of the court two decrees for divorce (but of what description he does not mention) in the time of Henry VIII., and two in the time of Elizabeth, after verdicts in the Court of Queen's Bench, I presume for adultery. I have been unable to discover them even with the help of Mr. Munro. *It is not unlikely, however, that the Court of Chancery under its clerical chancellors exercised jurisdiction to decree a divorce a vinculo matrimonii.*" (1 Spence's Eq. 702.) The first edition of Tothill's book was published in 1649, and as he is styled a "famous lawyer," it is highly probable that what he relates as having occurred not long before the time in which he lived actually took place.

Conceding, however, the fact to be otherwise, it is quite clear that the civil courts did not decline such jurisdiction because it

had been conferred on the spiritual courts. If those courts ever claimed the power, they never, after a date long anterior to the Reformation, attempted to decree a divorce *a vinculo matrimonii*. For more than 200 years, at least prior to a recent date, when the divorce court was established in England, marriage was there treated as a status or condition which was indissoluble except by death or act of Parliament.

“But the marriage status is entered into through the door of an ordinary contract; and for avoiding ordinary contracts, the jurisdiction of equity extends to all questions of fraud, mistake, duress, and lunacy. Hence, when an impediment of this sort intervenes, and jurisdiction for nullity has been conferred on no court by statute, our equity tribunals will entertain the complaint and declare the marriage void. Equity in England will not do this, because formerly there was an express jurisdiction in the ecclesiastical courts, and now there is in the divorce courts.” (2 Bishop on Marriage and Divorce, § 291.)

Now, as before the statute permitting divorces by courts, the contract is to assume the duties and obligations of matrimony. The contracting parties cannot limit those duties or obligations, nor expressly provide that their binding force shall last for a period other than life. But the duties and obligations are assumed only by the mutual consent of the parties, and marriage itself is often spoken of by law-writers and judges (without material inaccuracy) as a “civil contract.” Assuming, however, the marital status, into which the parties enter through a contract, is itself more than or different from ordinary contracts, yet when the legislature of this State provided that the relations between husband and wife, previously indissoluble, might be terminated as the result of a judicial proceeding, the nature of the status was, *to that extent*, modified, and it assumed the character of a contract, from future compliance with the obligations of which the parties cannot indeed release each other, but from which they may be relieved by the decree of an appropriate tribunal. Under the statute the marriage state is subject to termination by judicial decree. This element of possible disseverance affects the contract because the parties marry in view of a possible divorce, and the decree of divorce operates on the contractual relations by relieving the spouses of the duties they have

assumed towards each other by or through a contract. The power to divorce, which, save for the prohibition of the Constitution, could have been exercised by the legislature, has become judicial. Courts of equity have jurisdiction to decree or declare dissolution of copartnerships, and of other like contracts entered into to continue indefinitely, where there are mutual and continuing conditions. It would seem there could be little doubt that, when marriage has been deprived of its quality of indissolubility, and no special tribunal has been created for divorce cases, courts of equity should assume cognizance of such actions. Courts of equity have always exercised an analogous jurisdiction; their modes of procedure are adapted to the inquiries involved, and their decrees are more specific and flexible than the ordinary law judgments.

It is therefore not surprising that this court should have uniformly regarded actions of divorce as "cases in equity."

The fact that it did so regard them is too clear to admit of doubt, and that being so, its reasons for so regarding them are not now important. Our position is that for a period of thirty years next preceding the adoption of the present Constitution, actions of divorce were uniformly held to be "cases in equity," and that the framers of the present Constitution were aware of that when they conferred on this court jurisdiction "in all cases in equity."

On the other hand, it is contended that the framers of the present Constitution manifested their intention to effect a material change in that respect by conferring original jurisdiction on the Superior Court in actions of divorce *eo nomine*, and omitting to confer appellate jurisdiction in divorce cases *eo nomine* on this court.

But it conferred no other or greater jurisdiction on the Superior Courts in divorce cases than their predecessors the District Courts had exercised from the first under Constitutions in which no special mention was made of such cases. And from 1873 down to the date of the adoption of the present Constitution there was no statute in force which expressly conferred such jurisdiction on the late District Courts. The language of the Code was and is that, "marriage may be dissolved:—

"1. By the death of either of the parties; or

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"2. By a divorce adjudged by a court of competent jurisdiction."

To ascertain what court had "competent jurisdiction" it was necessary to consult the Constitution, which simply declared that "the District Courts shall have original jurisdiction in all cases in equity," etc. Why original jurisdiction in actions of divorce was not expressly conferred by the Code, as it had previously been by statute, on the District Courts, we will not attempt to explain. But from January 1, 1873, down to the time when the present Constitution went into effect, the District Courts derived whatever jurisdiction they had in divorce cases from the same source that this court has always claimed to derive its jurisdiction in such cases, viz., the Constitution. Nor can we satisfactorily explain why the words "of divorce and for the annulment of marriage," which are not to be found in either of the earlier Constitutions, were inserted in the present Constitution. They give the Superior Courts no greater or other jurisdiction in such cases than their predecessors, the District Courts had exercised under both of the former Constitutions, neither of which contained those words. And we cannot adopt the suggestion that they were inserted in the clause defining the *original* jurisdiction of the *Superior Courts*, for the purpose of curtailing the *appellate* jurisdiction of *this court*. That is not the way in which the framers of Constitutions and laws express their intentions. If the intention had been to take from this court the jurisdiction which it had previously exercised in divorce cases, the very clause, under which, for a period of seventeen years, it had claimed such jurisdiction, would not have been copied *verbatim*.

But while entertaining no doubt of the appellate jurisdiction of this court in divorce cases, pure and simple, it is at least pertinent to remark that this is not simply an action of divorce. Section 78 of the Civil Code provides: "If either party denies the same, or refuses to join in a declaration thereof, the other may proceed by action in the Superior Court to have the validity of the marriage determined and declared." The first count of the complaint or separate statement of a cause of action herein, after alleging in three paragraphs, the residence of plaintiff, her marriage with defendant, their cohabitation as husband and

wife, and that on the 25th of August, 1880, they jointly made a written declaration of marriage, proceeds to aver that, about the 21st of November, 1881, "the defendant demanded of plaintiff a surrender to him of said declaration of marriage, and threatened plaintiff with personal violence in case she refused to comply with said demand; *refused to recognize his said marriage* with plaintiff, drove the plaintiff away from him, and refused to live or cohabit with her unless she complied with his demand; and the defendant, for more than one year last past, has not lived with plaintiff, nor has he requested her to return to or live with him, thereby wilfully deserting the plaintiff." The answer denies the marriage and execution of the declaration. The prayer of the plaintiff is that "her marriage with said defendant may be declared legal and *valid*, and that she may be divorced," etc. If the plaintiff had utterly failed to prove any cause for divorce she would have been entitled to a decree declaring the alleged marriage valid, if the evidence established the fact of marriage. An action to have the validity of a disputed marriage determined and declared, under section 78 of the Civil Code, is in its nature a suit in equity. Such an action is not a "special proceeding," for even if it should be conceded that the right was newly created, no special proceedings for enforcing it are provided by the statute. The judgment herein in effect responds to the prayer of the complaint and declares that the alleged marriage was a valid marriage. From that portion of the decree, in any view of the case, an appeal lies.

If the order for the payment of alimony and counsel fees is in the nature of a final judgment, it is appealable. It certainly possesses all the essential elements of a final judgment. Nothing remained to be done except to enforce it, and for that purpose an execution might issue and be proceeded on, as if the judgment had been rendered in an ordinary action for the recovery of a specific sum of money. Although the pendency of an action for divorce constituted the basis of the order, it was no part of the relief demanded by the plaintiff in her complaint. She might at any time during the pendency of the action have applied to the court for such an order. And if granted it would not be affected by subsequent proceedings in the action. Its validity would not depend in any way on the result of the action. If

the court had afterward found that the marriage relation never existed between the parties, that would not have affected the order for the payment of *temporary* alimony. It would have afforded good ground for vacating it. It was to all intents and purposes, "a final judgment entered in an action." Quite as much so as the decree of divorce in this case in which "the question of property" is reserved for future consideration, "with leave to the plaintiff to apply upon the coming in of the referee's report . . . for a future and *final* decree." But it has not been suggested that the decree appealed from is not a final judgment in the action. It is final upon the questions adjudicated in it, and the order for the payment of temporary alimony is a final judgment upon all the questions adjudicated in it.

A final judgment is not necessarily the last one in an action. A judgment that is conclusive of any question in a case is final as to that question. The Code provides for an appeal from a final judgment, not from *the* final judgment in an action. In some of the States the question has been directly passed upon by the courts, some holding that such orders are, and others that they are not appealable. Of course, it rarely happens that the constitutions and statutes relating to appeals are precisely alike in any two States. But the reasons given by the courts for holding that appeals might or might not be taken from such orders in their respective States are worthy of consideration.

In *Lochnane v. Lochnane*, 78 Ky. 468, the court says: "That an appeal may be taken from a decree making an allowance to support the wife pending a suit for divorce cannot be questioned. It possesses all the essential elements of a final judgment. It may be enforced by rule or execution, and is in every respect independent of the final determination of the court as to the rights of the party in regard to the question of divorce." In *Hecht v. Hecht*, 28 Ark. 92, it was contended by the appellee that, inasmuch as the original suit between the parties was still pending in the Circuit Court, no appeal would lie to the Supreme Court from an order granting alimony and counsel fees until a final decree in the suit had been rendered. The court said: "Section 4, article vii., of the Constitution provides, that final judgment in the inferior courts may be brought by writ of error or by appeal into the Supreme Court, in such manner as may

be prescribed by law. It is not necessary for us, in the determination of this case, to construe this and section 15 of the same article. The order or judgment of the court is not, strictly speaking, an interlocutory one. While it may be true that a petition for alimony and attorneys' fees could not be brought as a separate and independent suit, yet it is also true that such an application and order for an allowance *pendente lite*, especially such a one as is made in this case, is, so far as it affects the rights of this appellant in its consequences, wholly independent of his suit for divorce. This is a definitive judgment, from which the appellant can have no relief by the final decree, even though it should appear that injustice had been done to him. By due process on the execution the money will have been collected and paid over to the parties in whose favor it is awarded, and its recovery will have passed beyond the power of the court. It is true that the allowance of alimony and other necessary costs is discretionary with the court trying the case, and will be interfered with by this court only upon the clearest proof that there has been a palpable abuse of that discretion. Yet when there has been such abuse which affects the substantial rights of a party, we are of the opinion that he can have redress by appeal to this court."

In *Golding v. Golding*, 74 Mo. 123, an appeal was taken to the Supreme Court from the judgment of the St. Louis Court of Appeals, affirming a judgment of the Circuit Court of St. Louis County granting a decree of divorce to plaintiff, and allowing to her, as alimony, the gross sum of \$15,000. The Supreme Court had no jurisdiction in divorce cases, when taken there by appeal from the St. Louis Court of Appeals, to pass upon the question whether the decree granting a divorce was justified by the evidence, and it was contended for the respondent that that provision of the Constitution which permitted appeals in cases where the "amount in dispute exclusive of costs exceeds \$2,500," had no application, "because the divorce was the matter in dispute, and the alimony was but an incident to the dispute." But the appellate court held against the respondent on the point and reviewed the award of alimony.

In *Blake v. Blake*, 80 Ill. 532, the Supreme Court of that State in ruling upon a motion exactly like the one now under

consideration said: "The question raised is one that has never been passed upon by this court, but upon first impression we are of opinion the appeal will lie. It is a money decree, is for a specific sum, and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution, or, if payment was wilfully and contumaciously refused, the decree might be enforced by attachment as for contempt, or payment might be coerced by sequestration of real or personal estate. By one mode or the other the decree could be enforced, and if defendant has property, it could, in some way consistently with the practice in Courts of Chancery be subjected to its payment. Such a decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and if no appeal lies, this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive. This ought not to be. It is no answer to this position to say, defendant can have this decree against him reviewed on appeal or error, after final decree in the original cause. Of what avail would that privilege be to him then? The litigation might be protracted, and years elapse before any final decision could be reached. In the meantime, he has been imprisoned for disobedience to the decree, or his property under process of law been subjected to the payment of the sum decreed. Nor does the fact an appeal is allowed impose any hardship not incident to other money decrees from which appeals may be prosecuted. On the theory alimony is for the immediate benefit of the wife, to enable her to prosecute or defend her suit against her husband on terms of equality, the only serious result would be to delay the litigation until the propriety of the decree for temporary alimony and solicitors' fees could be determined in the appellate court. On the contrary, if an appeal should be denied, it might subject defendant to very great hardships in many cases, as the sequel will show. It is apprehended there can be no decree against a party that will work a deprivation of his property or liberty, from which no appeal or writ of error will lie. Such is the decree against defendant. Under it he may be deprived of his liberty, or his property subjected to levy and sale."

The statute then in force in that State in relation to appeals was not substantially different from our own.

The reasoning of the Illinois court becomes much stronger when applied to the present case, where the main controversy between the parties is the question of marriage. It is, of course, indispensable to the granting of alimony at all, that the relation of husband and wife, in fact, exist. We are of opinion, therefore, that the order in question is in its legal effect a judgment and appealable as such. Indeed, the very section of the Code of Procedure under which execution was directed to be issued placed such order upon the same plane as a judgment. It reads: "Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment." And by section 942 of the same Code it is provided that "if the appeal be from a judgment *or order directing the payment of money*, it does not stay the execution of the judgment *or order*, unless a written undertaking be executed on the part of the appellant," etc. Such undertaking was executed in this case, and wrought a stay of proceedings under the order.

As the order for the payment of alimony and counsel fees is an appealable order, it cannot be reviewed on the appeal from the judgment decreeing a divorce.

Motions to dismiss the appeals from the judgment and from the order for the payment of alimony and counsel fees are denied. And it is ordered that all proceedings upon the last named order and the judgment be stayed pending said appeals.

ROSS, J., MYRICK, J., THORNTON, J., and MCKINSTRY, J., concurred.

MCKEE, J., dissenting. — I dissent. Two appeals have been taken in the case; one from the final judgment of divorce entered on the 19th of February, 1885, the other from an order made on the 16th of February, 1885, awarding to the plaintiff in the action alimony and counsel fees. To render his appeals effectual appellant has obtained from this court an order requiring respondent to show cause why, pending the appeals, all proceedings upon the judgment and order appealed from should not be

staid. This rule for a stay of proceedings has been met by a counter-motion to dismiss the appeals, upon two grounds, viz.: That the order is not appealable, and that no appellate jurisdiction of judgments of divorce has been given by law to this court. If these grounds be well taken they constitute sufficient cause against granting a stay of proceedings.

The order appealed from was made before the entry of judgment. An order made before judgment in a cause is interlocutory; that is to say, it is an order made between the commencement of the action and its final determination, incident to and during the progress of the action, which decides not the cause, but only some intervening matter relating to the cause. (2 Abb. Dict. 637.) Under the Code law of the State an appeal is the only mode in which a judgment or an order in a civil action can be reviewed. An interlocutory order is, therefore, not reviewable, except by an appeal directly from it, or from the judgment in the cause under the conditions specified in section 956 of the Code of Civil Procedure.

The right of appeal is entirely statutory. By chapter 1, title xiii., of the Code of Civil Procedure, the legislature has enumerated and defined the character and nature of the cases permitted to be appealed from the Superior Court to this court. These are:

"Section 939. An appeal may be taken:—

"I. From a final judgment in an action or special proceeding commenced in the court in which the same is rendered, within one year after the entry of judgment; but an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment.

"II. From a judgment rendered on appeal from an inferior court, within ninety days after the entry of such judgment.

"III. From an order granting or refusing a new trial; from an order granting or dissolving an injunction; from an order dissolving or refusing to dissolve an attachment; from an order granting or refusing to grant a change of the place of trial; from any special order made after final judgment, and from an interlocutory judgment in actions for partition of real property, and from an order confirming, changing, modifying,

or setting aside the report, in whole or in part, of the referees in actions for partition of real property, in the cases mentioned in the provisions in section 763 of this Code, within sixty days after the order or interlocutory judgment is made and entered in the minutes of the court, or filed with the clerk."

All orders made in a case before judgment, other than those enumerated are, therefore, unappealable; for as the remedy by appeal is purely statutory, the right cannot be extended to cases not included within the statute. Assuming, therefore, that the order appealed from is an interlocutory order, as it is not one of the interlocutory orders designated in the Code, to which the remedy of appeal attaches, no appeal can be taken from it. This is the settled law as to appeals from interlocutory orders; and it is applicable alike to all cases of law or equity. (Rhodes' Cal. Digest, vol. 1, pp. 31-33; *Broadribb v. Tibbets*, 60 Cal. 412; *McNevin v. McNevin*, 63 Cal. 186; *Holmes v. McCleary*, 63 Cal. 497; *People v. Markham*, 64 Cal. 157; *Emeric v. Alvarado*, 64 Cal. 529, and *Beach v. Hodgdon*, 66 Cal. 187.)

But the contention is, that as the order in this case commands payment of a large sum of money, it is more than interlocutory—it possesses the force and dignity of a final judgment, because the Code provides (§ 137, Civ. Code) that it may be enforced by execution; and being enforceable by execution it is equivalent to a final judgment, which is appealable.

If that position were maintainable, the giving of the requisite undertaking on appeal, as from a money judgment in a case, would itself operate under section 940 of the Code of Civil Procedure, as a stay of proceedings; and this court could, in the exercise of its appellate jurisdiction, in case of failure or omission to file a proper undertaking on appeal, permit the appellant to perfect his appeal by filing a new undertaking.

But section 940, and those sections of the Code which follow it, have no reference to non-appealable orders; they regulate the mode of appealing from final judgments, and appealable orders in suits at law or in equity.

Besides, the interlocutory character of the order appealed from is not changed by the fact that it commands payment of a large sum of money. Nor is it affected by the provision of the Code as to the process by which it may be enforced. It is the execu-

tion that may be issued upon the order to which the Code gives the same legal effect as if issued upon a final judgment; but it does not give to the order the effect of a final judgment. The order is unchanged in its nature by the remedy adopted for enforcing it, and the execution is given merely as an additional remedy for that purpose. As an additional remedy the court making the order is not bound to resort to it. Especially in actions of divorce it is left to the discretion of the court to enforce an order made *pendente lite* by execution, or by proceedings for contempt for not complying with it, or by requiring reasonable securities for making the payment of the money, or by the appointment of a receiver, or by any other remedy applicable to the case. (§ 140, Civ. Code.) As remedies for the enforcement of an order *pendente lite*, these with the exception of the remedy by execution are not prescribed by the Code for the enforcement of a money judgment.

Moreover, a judgment is the final sentence of the law in an original suit; a money judgment is a legal demand or a record debt upon which suit may be brought. The money order in this case is for alimony. Alimony is not an original suit; it arises out of some other suit in which a marriage *de facto* is confessed or proved. The allowance of alimony, pending such a suit, is not a debt; it is a legal liability which arises out of the obligation imposed by law upon every married man to contribute to the support of his wife. When the fact of marriage is judicially ascertained the jurisdiction of the court to award alimony, *pendente lite*, as incidental to the suit before it, may be called into exercise by the motion of the wife; and the court, in the exercise of its jurisdiction, may award it out of the community property, or the separate property of the husband. (§ 141, Civ. Code.) In making the award the court acts upon the principle that the husband and wife are jointly interested in the property and fortunes of the community, and that one is as much entitled as the other to maintenance and support out of it during the proceedings between them for a separation. So that allowing the wife alimony is only awarding her what she is as a wife lawfully entitled to. Her rights of property in the community estate are vested until divested by a judicial decree, which dissolves the marriage status, and makes distribution of the estate.

Given, therefore, jurisdiction of the parties to an action of divorce by a court of competent jurisdiction, the court also acquires jurisdiction of the estates and income of the husband for the purpose of compelling the husband to support the wife pending the action. Section 137 of the Civil Code provides:

“While an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action. When the husband wilfully deserts the wife, she may, without applying for a divorce, maintain in the Superior Court an action against him for permanent support and maintenance of herself, or of herself and children. During the pendency of such an action the court may, in its discretion, require the husband to pay as alimony any money necessary for the prosecution of the action and for support and maintenance, and executions may issue therefor in the discretion of the court. The final judgments in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court.”

And when the court in the exercise of its discretionary power ascertains and fixes the amount of the alimony and awards it to the wife, the right to the amount awarded attaches to her and becomes vested in her as a right, and there arises a corresponding duty on the part of the husband to pay it to her. The order binds both the right and the duty; and as an order made in the exercise of a discretionary power, it is not, in its nature, or the remedy adopted for its enforcement, subject to the control of this court. It is not a debt which the husband is required to pay. It is a duty which he is bound to perform. (*Chase v. Ingalls*, 97 Mass. 274.) This is the settled law of the question of alimony *pendente lite* in an action of divorce.

In *Miller v. Miller*, 75 N. C. 71, the Supreme Court of North Carolina says: “The statute relating to divorce and alimony proceeds upon the natural duty of the husband to support the wife as well before as after divorce, and must be liberally construed to express that duty.

“Alimony is not itself an ‘estate’ in a technical legal sense of the word, nor is it necessarily a charge upon the husband’s

estate. He may have no estate. But alimony is a mere personal charge upon the husband, or a duty imposed upon him which the courts will enforce against him from time to time, at discretion, compelling the payment thereof from his income, whether he have an estate or not."

In this State the question arose in *Ex parte Perkins*, 18 Cal. 60. There the defendant in an action of divorce was ordered, *pendente lite*, to pay to the wife a certain sum of money for her support during the litigation, and for counsel fees and other legal expenses. The court enforced its order by imprisonment for contempt in not complying with the order, and the defendant asked to be discharged from imprisonment upon the ground that the sum adjudged to be paid to the wife was a debt within the meaning of the Constitution, for which he could not be legally imprisoned. But the Supreme Court said, Mr. Justice Baldwin delivering the opinion: "This is not a debt within the meaning of the Constitution. The husband is bound to support the wife, yet this duty is an imperfect obligation which is not technically a debt. He does not owe her any specific amount of money; but he owes a duty to her which may be enforced by the order of a court compelling him to pay her money. So alimony, temporary or permanent, may be decreed by the court, and this may be done at the discretion of the court."

In the proceedings in that case it was conceded that there was no appeal from the order, because it was an order *pendente lite*, and therefore interlocutory, to which the right of appeal was not extended by section 336 of the Practice Act, which then regulated appeals to the Supreme Court from the judgments and orders of the District Courts; and the husband afterwards sought to have the order reviewed on *certiorari*; but as the alimony awarded was within the discretion of the court, it was held upon the reasons stated by Mr. Justice Baldwin to be unreviewable. (See also *Call v. Call*, 65 Me. 40.) The order was therefore absolute, and so far as other courts are concerned final, subject only to be changed, modified, or revoked by the court that rendered it, in the exercise of its discretionary powers.

Such being the nature of an order awarding alimony, pending an action of divorce, it is not an intermediate order which affects the merits of the action itself, or the final judgment that may

be rendered therein; for a divorce may or may not be granted in the action. It is therefore not reviewable under section 956 of the Code of Civil Procedure except by appealing from the final judgment, if the law grants the right to appeal from it. And that brings us to the consideration of the question, is there an appeal to this court from the judgment of a Superior Court in an action of divorce?

The question must be determined with reference to the Constitution of 1879, and the laws enacted in conformity to it in carrying out its provisions as to the organization and jurisdictions of the two courts. By section 5, article vi., of the Constitution, it was ordained as follows:—

“The Superior Court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest or the value of the property in controversy, amounts to \$300, and in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for; of actions of forcible entry and detainer, of proceedings in insolvency, of actions to prevent or abate a nuisance, of all matters of probate, of divorce and for annulment of marriage, and of all such special cases and proceedings as are not otherwise provided for.”

As organized, under and by virtue of this section, the Superior Court consists of seven or eight different courts, namely, a court of law, a court of equity, an insolvency court, a court of forcible entry and detainer, a probate court, a criminal court, a court of divorce, and a court of special cases and proceedings; and when sitting in any one of those courts, the Superior Court has and exercises jurisdictions of matters cognizable in the court.

At the same time that the Superior Court was created and partitioned off into different courts, and clothed with the jurisdiction belonging to each, the Supreme Court of the State was reorganized and invested with its appellate and original jurisdiction. Section 4, article vi., of the Constitution, declares:—

“The Supreme Court shall have appellate jurisdiction in all cases in equity, except such as arise in Justices’ Courts; also in all cases at law which involve the title or possession of real

estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy amounts to \$300; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone. The court shall also have power to issue writs of mandamus, *certiorari*, prohibition, and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction."

This grant of judicial power expressly includes within the appellate jurisdiction of the court cases of law and equity, cases of forcible entry and detainer, cases of insolvency, cases for preventing and abating nuisances, probate matters, and criminal cases; but it excludes, negatively at least, from the jurisdiction of the court, cases for annulment of marriages and of divorce, and special cases and proceedings. No express mention is made of any one of these cases as cases of which the Supreme Court has jurisdiction. Special cases, it has been adjudged, do not fall within the jurisdiction of the court (*Bizler's Appeal*, 59 Cal. 550), and for the same reasons divorce cases do not, unless they are to be considered as included within one or other of the two great divisions of administrative justice known as law and equity. (*Bizler's Appeal*, 59 Cal. 550.)

That much is conceded by counsel for appellant. It is also conceded that an action of divorce is not an action at law. They say: "It must be either an action at law, a suit in equity, or in the language of the Constitution, 'It is a case in equity or a case at law'; that is, it is the former, and not the latter, as has been generally assumed by the courts of equity in this country, and particularly so in the State of California. If an action for divorce falls within the expression 'case in equity,' then, clearly, by the terms of the Constitution this court has appellate jurisdiction in such cases."

Thus stated, the contention is reduced to the single proposition, that an action of divorce is a suit in equity, and that is the question.

The Chancery Court of England, as the "King's High Court of Conscience," claimed an elastic, original, concurrent, and

auxiliary jurisdiction under which it assumed to exercise a supervisory control, according to equity principles, of almost all proceedings in the Superior Courts of common law. But it never claimed to have or exercise original or concurrent jurisdiction of the subjects of marriage and divorce. These were alone cognizable in a court known as the ecclesiastical court, whose jurisdiction being founded on the canon or civil law, was entirely separate from the secular jurisdiction of other courts. It is true that the court, under the influences of legislation and judicial construction, slowly developed from a spiritual court into the form prescribed for it by the common law; and the legal powers which it exercised became part of the common law system of jurisprudence; but it retained its name and its exclusive jurisdiction throughout all its changes in form. With that jurisdiction the Chancery Court never interfered, except incidentally, by issuing original writs to keep the court within its jurisdiction, or to aid it, after divorce, in enforcing its decrees or orders, or to prevent the husband from evading by fraud payment of alimony awarded to the wife. Otherwise the Chancery Court never claimed or exercised any original or concurrent jurisdiction over the subjects of marriage and divorce. These constituted the subject-matters of jurisdiction under which the common law belonged at all times exclusively to the ecclesiastical courts.

In Fonblanque's treatise on Equity, note *n*, p. 107, it is said: "The right to decree alimony was only exercised as incidental to an action of divorce; and a decree of divorce, or even a separation, was never even suggested to be within the jurisdiction of a court of equity, except after divorce or upon special agreement." And in *Head v. Head*, 3 Atk. 550, Chancellor Hardwick observed: "I do not find that this court ever made a decree for establishing a perpetual separation between husband and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even upon this unwillingly." (See Story Com. on Eq., §§ 1420-1425; *Mattison v. Mattison*, 1 Strob. Eq. 381.)

So in an action in equity to prevent a decree from being defeated by fraud, the Supreme Court of the United States took occasion to say: "Our first remark is — and we wish it to be remembered — that this is not a suit asking the court for the

allowance of alimony. That has been done by a court of competent jurisdiction. The court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

"We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or as an incident to divorce *a vinculo*, or to one from bed and board." (*Barber v. Barber*, 21 How. 584.)

Unquestionably, therefore, under the common law wherever established, no other than the ecclesiastical or spiritual court had the legal power to grant divorces or annul marriages. And that court, as a court of divorce, administered its powers by a body of principles and procedure of its own, which, in themselves, constituted a system of jurisdiction as separate and distinct as that of a court of law, or of equity or admiralty. As incidental to its power, it assumed control of the property of the parties, and allowed alimony to the wife, pending an action of divorce, on the principle that she — the husband having possessed himself of her fortune — was without sufficient means independent of him to support her in her condition in life; and it exercised its discretion in making the allotment. When made the sentence of allotment was absolute, subject only to be revised and modified by the court itself; its decisions as to matters within its jurisdiction could not be revised by the civil courts. No appeal lay from them to any secular jurisdiction. An appeal might be taken to the Pope, or to his legate, until the statute of Henry VIII. abolished that procedure and substituted an appeal to the High Court of Parliament. (Browne's Ecclesiastical Law, p. 507.)

It may be conceded that this system of jurisdiction was a part of the common law which constitutes the basis of the jurisprudence of the State, but we have never had an ecclesiastical court; yet the legal powers formerly exercised by that court were part of the sovereign power of the people of each of the several States of the United States; and the people themselves could, by constitutional command, or legislative enactment, delegate those powers to any tribunal they saw fit to create, to be exercised absolutely or otherwise. Until the people did delegate such powers they remained in abeyance; there was no inherent jurisdiction in courts of law or equity to grant divorces. Hence, at

an early day in the history of the country, Judge Gaston of North Carolina held, that in the absence of constitutional provisions, or of legislation upon the subjects of marriage and divorce, the courts of North Carolina had no jurisdiction of divorce suits, or to grant alimony. (*Wilson v. Wilson*, 2 Dev. & B. Eq. 377.) And Chancellor Kent, in his Commentaries, shows that, although prior to the Revolution a Court of Chancery had existed in every one of the thirteen colonies, yet for one hundred years preceding the Revolution, and for many years after New York became an independent State, there was no lawful mode of obtaining divorce until the legislature in 1787 authorized the Court of Chancery to pronounce divorces *a vinculo*. (2 Kent Com. 98, 125.) "The true doctrine is," says Bishop in his treatise on Marriage and Divorce, "that no judicial tribunal can take jurisdiction of divorce cases without the authority is specially conferred by the Constitution of the State, or by some law duly passed by the legislature. (Bishop on Marriage and Divorce, § 71; *Jarvis v. Jarvis*, 3 Edw. Ch. 462; *Jamison v. Jamison*, 4 Md. Ch. 293; *Wright v. Wright*, 2 Md. Ch. 447; 56 Am. Dec. 723; *Barker v. Dayton*, 28 Wis. 379; *Hopkins v. Hopkins*, 39 Wis. 171; *Bacon v. Bacon*, 43 Wis. 202; *Grant v. Grant*, 12 S. C. 29, 31; *Cook v. Cook*, 56 Wis. 203; *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.)

Every State has the inherent right to distribute judicial powers over such subjects to tribunals of its own creation, and to define the jurisdiction of each, and prescribe its mode of procedure. And it will be found that most, if not all the decisions by courts of other States cited to uphold the right of appeal in such cases rests upon either a constitutional or legislative grant of original jurisdiction in such cases to courts of law, or courts of chancery, to be exercised according to legal or chancery principles and practice, or of appellate jurisdiction to the Supreme Court "in all cases."

Thus the States of Massachusetts and New Hampshire, by their respective Constitutions, ordained that "causes of marriage, divorce, and alimony, and all appeals from the judges of probate, shall be heard and determined by the governor and council, until the legislature shall by law make other provisions." (Art. v., ch. 3, Const. of Mass.; § 76, part II., Const. of N. H.)

Georgia, by her Constitution, prohibits divorces being granted, except on the concurrent verdicts of two special juries — the jury rendering the final verdict being authorized to determine the rights and disabilities of the parties, subject to revision by the courts upon legal principles. (§ 11, art. v., Const. of 1868.) Alabama and Mississippi, by their respective Constitutions, provide that divorces shall not be granted but in cases by suit in chancery, provided for by law. (§ 3, art. iv. Const. of Alabama; § 15, art. iii. Const. of Mississippi.)

The Constitutions of other States whose adjudications have been cited on argument contain no express grants of jurisdiction of the subjects of marriage and divorce to any judicial tribunal. Power, however, has been delegated to the legislature of each of those States to select or establish a judicial tribunal upon which to confer legal powers to annul marriages and grant divorces; and it will be found that the legislature has generally vested such jurisdiction and powers in a separate Court of Chancery, sometimes in a *nisi prius* court, and at others in a *nisi prius* court sitting as a Court of Chancery. Thus in Arkansas it is provided: "The Circuit Court, sitting as a Court of Chancery, shall have jurisdiction in all cases of divorce and alimony or maintenance, and like process and proceedings shall be had in said cases as are had in other cases on the equity side of said court." (§ 3, ch. 59, Digest of Statutes; *Bauman v. Bauman*, 18 Ark. 320; 68 Am. Dec. 171.) Kentucky conferred such jurisdiction upon the Chancery Court by Statute of 1809 (*Maguire v. Maguire*, 7 Dana, 181), Maryland by Statute of 1841, supplemented by statutes passed in 1843 and 1844 (*Brown v. Brown*, 2 Md. Ch. 316; *Bayly v. Bayly*, 2 Md. Ch. 326), New York by statute passed in 1824 (*Perry v. Perry*, 2 Paige, 501; *Williamson v. Williamson*, 1 Johns. Ch. 488), Virginia by statute passed in 1827 (*Jennings v. Montague*, 2 Gratt. 350), Illinois by Revised Statute of 1874 (*Dinet v. Eigenmann*, 88 Ill. 274), Indiana by Revised Code of 1831, confided the jurisdiction to courts of law (*Varner v. Varner*, 3 Blackf. 163); but in 1833 the Statute of 1831 was repealed, and the jurisdiction was expressly given to Courts of Chancery. Ohio by Statute of 1835 conferred such jurisdiction on the court of common pleas (*Hoffman v. Hoffman*, 15 Ohio St. 217), Rhode Island and Vermont

on the Supreme Court, until the latter State by Statute of 1870 granted jurisdiction to the county court (*Preston v. Preston*, 44 Vt. 630; *Thayer v. Thayer*, 9 R. I. 379). So that in those States divorce cases are by express statutory provisions made cases in law, or cases in equity, and appealable as such, unless as in Kentucky, under a Statute of 1816, and in Kansas under a Statute of 1860, appeals in such cases are interdicted. (*Maguire v. Maguire, supra*; *Worth v. Worth*, 4 Kan. 223.)

So when this State in 1879, in the exercise of its sovereign powers, amended the Constitution, it could have granted to the Superior Court as a court of law or equity, jurisdiction and powers to annul marriages, and decree divorces according to legal or equity principles and practice, and made its judgments and orders final, or revisable by this court; but it did not. The framers of the Constitution did not clothe the Superior Court as a court of law, or of equity, with such jurisdiction. In their wisdom they framed the Constitution so as to prohibit the legislature from passing special laws for granting divorces (art. iv., § 25), clothed the Superior Court with original jurisdiction of divorces and of annulment of marriages (art. vi., § 5), and this court with appellate jurisdiction in cases at law . . . and in cases in equity . . . and made no express provision for appeal to this court from judgment or orders in divorce cases (art. vi., § 4).

Nor has the legislature in executing the behests of the Constitution as to the organization and jurisdiction of the Superior Court made any provision for appeal from its judgment or orders in cases of divorce. It has prescribed the jurisdiction of the court as a court of divorce, a jurisdiction identical with that formerly exercised by the ecclesiastical courts, and authorized it to exercise its jurisdiction and powers in the same manner that the ecclesiastical court had exercised them, that is, at its discretion. It provided for an appeal in all cases in law and equity, and in probate matters, etc., but it provides no appeal in divorce cases.

And the reason for thus regulating the right of appeal is, we think, apparent from the nature of the jurisdiction conferred on the court. The subjects of the jurisdiction are marriage and divorce. "In respect of the Constitution of the State," says Mr.

Amos in his treatise on the Science of Law (p. 124), "marriage must be viewed as an *act* which determines the creation of a new family group, and from which act spring a number of relations, actual and possible, moral and legal; relations which, taken in their aggregate, constitute marriage as a status."

In this State marriage is also regarded in law as a status, a public institution, and more than a mere contract. Section 55 of the Civil Code defines it as "a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations," those "actual and possible, moral and legal relations" which constitute the status.

An action for the annulment or dissolution of a matrimonial status is, therefore, not an action in equity, involving the personal and separate property of married women, the adjudication of antenuptial or postnuptial settlements and articles, or of marriage contracts absolutely void as against public policy or for fraud — subjects of which Chancery Courts have jurisdiction; it is a statutory proceeding within a jurisdiction *sui generis*, which is exercisable at the discretion of the court to which it has been confided; and the judgments and orders rendered by the court in the exercise of its discretionary powers are not reviewable.

In view of this familiar principle of law, and knowing that the judgments or orders of any of the judicial tribunals of the State, which may be **voidable** or void for want of jurisdiction, or excess of jurisdiction, or abuse of discretion, are reviewable by original writs issuable by the Superior Court or the Superior Courts, the legislature doubtless determined there was no reason for according the right of appeal in divorce cases; therefore no appellate jurisdiction has been by express terms prescribed to this court in such cases (§ 52, Code Civ. Proc.), and the right of appeal is withheld, except where, after granting a divorce, a question arises as to the distribution of the community property or of the homestead property. On a question concerning such property an appeal is expressly allowed by section 148 of the Civil Code, but on no other question involved in the case. Such was the nature of the appeals decided by this court in the divorce

cases of *Bovo v. Bovo*, 63 Cal. 77, and *Brown v. Brown*, 60 Cal. 579, and such have been the nature of appeals in many of the divorce cases in which appeals have been heard and decided by former Supreme Courts. (See *Kashaw v. Kashaw*, 3 Cal. 312; *Elmore v. Elmore*, 10 Cal. 224; *Gimmy v. Gimmy*, 22 Cal. 633, 635; *McLeran v. Benton*, 31 Cal. 29.) So that a decree of divorce is not only a dissolution of the matrimonial status, but it is also a dissolution of the marital rights of parties in their real estate; and while this court is denied jurisdiction to disturb that part of the decree granting a divorce, it has jurisdiction to revise that part of the decree for a division of the estate.

Undoubtedly former Supreme Courts of the State as well as the present court have heard and decided appeals in divorce cases on the merits. In no case, however, has the question to hear and determine such appeals been directly made, except in *Conant v. Conant*, 10 Cal. 249. In that case the appeal was taken from a divorce granted by one of the then District Courts to the Supreme Court, as then clothed with jurisdiction by the Constitution of 1849. And it was held, that under the Constitution the court had appellate jurisdiction "in all cases," except where the matter in litigation, being capable of pecuniary compensation, did not exceed in value \$200. In rendering its decision the court said:—

"The fourth section of article vi., of the Constitution provides that the Supreme Court shall have appellate jurisdiction in *all cases* when the matter in dispute exceeds \$200, when the legality of any tax, toll, or impost, or municipal fine is in question, and all criminal cases amounting to felony, on questions of law alone. We do not understand the last words of the first clause of this section as restricting the jurisdiction only to those cases which involve questions of property, or the legality of a tax, toll, impost, or municipal fine. As we read the section, the court possesses appellate jurisdiction in *all cases*; provided, that when the subject of litigation is capable of pecuniary compensation the matter in dispute must exceed \$200."

Under the same Constitution of 1849 the Supreme Court, in the year 1861, in deciding an appeal from a divorce granted in the case of *Lyons v. Lyons*, 18 Cal. 147, said: "This is a suit in equity, and the only error assigned is that there are no find-

ings to support the judgment." And assuming it to be a suit in equity, it was held, on the authority of *Walker v. Sedgwick*, 5 Cal. 192, which was a chancery case, that findings were not necessary. But neither the assumption in that case, nor *Conant v. Conant*, which was questioned in *Knowles v. Yates*, 31 Cal. 82, and in *Houghton's Appeal*, 42 Cal. 35, nor the practice of dealing on appeal with divorce cases, as cases in equity, can be considered as authoritative of the question as now raised for the first time under the Constitution of 1879 and the statutes passed in executing its commands.

In view of the Constitution and the laws passed under it, I think cases of divorce and for the annulment of marriage are not cases of which appellate jurisdiction has been granted to this court. This conclusion is justified, if not sustained, by the reasoning in *Bixler's Appeal*, 59 Cal. 550, and by the decision in the case of *Church v. Church*, No. 9405, Jan. Sess. 1884. This last case was a case in divorce, commenced and prosecuted since the adoption of the Constitution of 1879, dissolution of the marriage was decreed; the wife was awarded the custody of the children, and the husband was adjudged to pay her out of his separate property certain sums of money for alimony and counsel fees, and for the support, maintenance, and education of the children. To enforce payment of the sums awarded for those purposes the court appointed a receiver to take charge of the separate property of the husband, collect its rents, and pay them to the wife, until the husband gave reasonable security to pay her. He refused to pay, or to give security, and appealed from the decree to this court; and to render his appeal effectual, he applied to the court here and obtained an order to show cause (as has been done in this case), why proceedings in the divorce court should not be stayed pending the appeal, and to fix the amount of an appeal bond to operate as a stay. But this court refused to interfere with the proceedings of the court below, or to fix the amount of a stay bond.

I think the application for a stay of proceedings should be denied, and the appeals dismissed.

On a petition for a rehearing the following opinion was filed on the 29th of July, 1885.

ROSS, J. — In the opinion recently delivered in this case we held, *first*, that an action for divorce is a case in equity, and that an appeal lies to the Supreme Court from the judgment of the Superior Court granting a divorce; and *second*, that an order made *pendente lite* by the Superior Court directing the payment of alimony is also appealable. In the petitions for rehearing on file it is said by counsel for the plaintiff that in holding that the order for the payment of alimony is appealable, we have decided exactly contrary to several former decisions of this court. *Church v. Church*, No. 9405; *MacNevin v. MacNevin*, 63 Cal. 186; *Ex parte Cottrell*, 59 Cal. 417, and *Ex parte Perkins*, 18 Cal. 60, are the cases in which it is said by counsel that an opposite conclusion was announced. In *Church v. Church*, no order *pendente lite* for the payment of alimony was made by the Superior Court. The question as to whether such an order was or was not appealable could not therefore by any possibility have arisen in the case. The trial court there granted the plaintiff a divorce, and in its decree granting the divorce awarded the plaintiff permanent alimony and a certain stated sum for fees of counsel. From that decree the defendant gave notice of appeal to this court, and within statutory time executed an undertaking, pursuant to section 941 of the Code of Civil Procedure, in the sum of \$300. There can be no sort of doubt that the notice and undertaking thus given perfected the appeal to this court from the final judgment of the Superior Court. The only question in *Church v. Church* was as to a stay of proceedings upon the judgment. The only undertaking given by the appellant was the one in the sum of \$300 for the payment of such costs and damages as might be awarded on the appeal, but the appellant subsequently applied to the Superior Court to fix the amount of an undertaking to be given by him for the purpose of staying all proceedings on the judgment, and the application being denied by the Superior Court, a similar application was made here and denied, no opinion being delivered. This was the case of *Church v. Church*, and all of it, which is cited and deliberately stated by counsel for the plaintiff in the present case to have decided that there was no appeal from an intermediate order in an action of divorce directing the payment of alimony. No argument can make plainer the fact

that no such question was or could have been involved in *Church v. Church*. And so with respect to the other cases cited by counsel for plaintiff. A bare statement of the facts will clearly show that in none of them has this court ever decided contrary to what we have held in the present case. In *MacNevin v. MacNevin*, 63 Cal. 186, which was an action for divorce, the District Court had, pending the action, made orders from time to time directing the defendant to pay certain sums as alimony, which orders, though enforceable by executions, were in fact never enforced. The court after trial ordered "that plaintiff's prayer for divorce be denied, and that defendant have judgment for costs." After the making of this order, on motion of defendant's counsel, all the orders formerly made granting to the plaintiff alimony were vacated, and from this last order the plaintiff appealed as from an order made after final judgment. But the court held that the record only showed an *order* for judgment, and, therefore, that the order setting aside the orders granting alimony was not an order made after final judgment, and consequently not appealable.

In *Ex parte Cottrell*, 59 Cal. 419, this court distinctly said: "Whether any undertaking could be given which would operate as a stay of the execution of the order (for the payment of alimony) pending the appeal, or whether any appeal lies from such an order, are questions which do not necessarily arise in this case, and we therefore express no opinion upon them." Yet counsel for the plaintiff here say that in *Ex parte Cottrell*, we decided that no appeal lay from an order directing the payment of alimony. *Ex parte Perkins*, 18 Cal. 60, is the only other case in which it is said by plaintiff's counsel that this court has held that there was no appeal from an order granting alimony. In that case Perkins was, by an order of the court, directed to pay a sum of money for expenses incurred by his wife in the action for divorce, and having refused to do so, was imprisoned, and sought to be discharged from imprisonment on habeas corpus upon the ground that the sum adjudged against him was a debt within the meaning of that provision of the Constitution which secured the citizen against imprisonment for debt, except for fraud. The court held, and properly held, that the amount ordered to be paid by the husband was not a debt within the meaning of the Constitution; that the husband did not owe the wife

any specific sum of money, but he owed a duty to her which might be enforced by order of the court, compelling him to pay her money. The question there, the case being habeas corpus, involved only *the power* of the court to make the order. No question of appeal was involved, nor could the regularity of the proceedings be in any way considered. There is no inconsistency between that case and our ruling in the present one. We have never said that an order for the payment of alimony was a final judgment in the sense that a judgment for the payment of money from one man to another is, but we said, as did the Supreme Court of Illinois and Kentucky in the cases cited, that it was *in the nature* of a final judgment, possessing the essential elements of such judgment, and which could be enforced not only by execution against property, but by imprisonment of the body of the delinquent. We repeat the fact that the question under consideration has never before been passed upon in this State, and that it is with us as the case of *Blake v. Blake* was with the Supreme Court of Illinois, one of first impression. The court there says: "The question raised is one that has never been passed upon by this court, but upon first impression we are of opinion the appeal will lie. It is a money decree, is for a specific sum, and is payable absolutely. No execution has been as yet awarded, but the court has the undoubted authority to award an execution, or if payment was wilfully and contumaciously refused, the decree might be enforced by attachment as for contempt, or payment might be coerced by sequestration of real or personal estate. By one mode or the other the decree could be enforced, and if the defendant has property, it could in some way, consistently with the practice in Courts of Chancery, be subjected to its payment. Such a decree does not seem to us to be merely interlocutory. It is more in the nature of a final decree, and if no appeal lies this case affords an instance of a money decree against a party from which no relief can be had, no matter how unjust or oppressive. This ought not to be. It is no answer to this position to say defendant can have this decree against him reviewed on appeal or error after final decree in the original cause. Of what avail would that privilege be to him then? The litigation might be protracted, and years elapse before any final decision could be

reached. In the meantime he has been imprisoned for disobedience to the decree, or his property under process of law been subjected to the payment of the sum decreed. Nor does the fact an appeal is allowed impose any hardship not incident to other money decrees from which appeals may be prosecuted. On the theory alimony is for the immediate benefit of the wife to enable her to prosecute or defend her suit against her husband on terms of equality, the only serious result would be to delay the litigation until the propriety of the decree for temporary alimony and solicitors' fees could be determined in the appellate court. On the contrary, if an appeal should be denied, it might subject defendant to very great hardships in many cases, as the sequel will show." (80 Ill. 523.) The allowance of alimony is largely discretionary with the trial court, and will therefore be interfered with by the appellate court only in cases of abuse of discretion. Ordinarily in actions for divorce the marriage relation is not controverted, and should frivolous appeals be taken it will be an easy matter to impose such penalty as will put a stop to the practice. But in cases where the fact of marriage is the real issue no alimony should of right be paid until the fact of marriage or no marriage is properly determined, for the obvious reason that there can be no such thing as alimony unless the relation of husband and wife in fact exist.

There is, however, some question as to the character of bond necessary to stay proceedings upon the order for the payment of alimony.

With respect to that question, and to that only, there is some inconsistency in the opinions of the court, and upon that question, and that only, we desire to hear further argument, and for that purpose and to that extent only grant a rehearing.

MORRISON, C. J., THORNTON, J., MCKINSTY, J., and SHARFSTEIN, J., concurred.

MYRICK, J., concurring. — I agree with the views presented by Ross, J., down to the reasons given for a rehearing. I am satisfied with the judgment heretofore given. I wish to add the following to what has been said in favor of the appellate jurisdiction of this court: —

Independent of what has been already said, I am of opinion that under the present Constitution there can be no question as to the appellate jurisdiction of this court in the case of an alimony order. I base this view on the terms of the Constitution, viz.: Article vi., section 5: "The Superior Court shall have original jurisdiction *in all cases in equity*." Article vi., section 4: "The Supreme Court shall have appellate jurisdiction *in all cases in equity*." Wherever and whenever a Superior Court has jurisdiction to take any step or proceeding, or make any order in any case in equity of that step, proceeding or order, the Supreme Court has appellate jurisdiction. The legislature may provide machinery, it may declare when the appeal may be taken (as in regard to orders which involve the merits or necessarily affect the judgment it has done), but neither by direct action nor by omission can the appellate jurisdiction of this court be abridged; it is given by the Constitution in such plain and unequivocal words that it cannot be shorn off.

If, then, an action to have the validity of an alleged marriage determined and declared, or for divorce, be a case in equity, it conclusively follows that any order, step or proceeding which the Superior Court has jurisdiction to make in such action is subject to review by this court.

By way of contrast and to show more clearly, if need be, the meaning of the above-quoted clauses of the Constitution, I quote as to probate matters: Article vi., section 5: "The Superior Court shall have original jurisdiction . . . of all matters of probate"; article vi., section 4, "The Supreme Court shall have appellate jurisdiction . . . in all such probate matters as may be provided by law."

In probate, appellate jurisdiction is given in such matters only as the legislature may provide, while in equity cases the appellate jurisdiction is as broad and extensive as is the original jurisdiction.

It has been repeatedly held that where appellant jurisdiction is given, and no machinery is prescribed, the appellate court will furnish machinery, to the end that the right of review be not lost. (*Houghton's Appeal*, 42 Cal. 35; *People v. Jordan*, 66 Cal. 10.

As to whether the action now under consideration is a case in

equity has been considered in the opinion heretofore filed, and I do not deem any addition in that regard necessary or useful.

A rehearing having been had, the following opinion was filed on the 30th of November, 1885:—

THORNTON, J. — In this case, on a rehearing granted on the 29th of July last, a question as to the character of the undertaking required to stay proceedings in the court below on the appeal from the order in relation to alimony and counsel fees was left open to be argued. That question has been submitted for decision.

We are of opinion that the undertaking filed in this case is sufficient. It is in form proper, and in amount appears to be ample in point of security to the respondent in case of affirmance of the order. It does not appear that any exception was taken to the undertaking in the court below for insufficiency in form, or in any other respect.

The order herein, as said in the former opinion, is in the nature of a final judgment, and under such circumstances the statute as to the undertaking to stay proceedings on a final judgment applies. The statute (Code Civ. Proc., § 942) requires that the undertaking for a stay of proceedings in such case should be in double the amount named in the judgment or order. In this case, in the order in relation to alimony and counsel fees, two lump sums are mentioned, and also a sum which is required to be paid monthly. The amount in the undertaking is double the amount of the lump sums, and double the amount of the monthly payments for the period of three years, assumed to be the period during which the appeal will probably be pending. The whole amount covered by the undertaking is \$305,000. We think that the undertaking for such amounts is in accordance with correct construction of the statute when applied to such an order.

We find nothing in *Ex parte Perkins*, 18 Cal. 60, or *Ex parte Cottrell*, 59 Cal. 417, or *MacNevin v. MacNevin*, 63 Cal. 186, in conflict with our former decision in this case. In *Church v. Church*, No. 9405, heard before Department One, there was no opinion delivered, and on what grounds the motion in that case was denied does not appear on the records of this court. Con-

ceding that some inconsistency appears to exist from the fact that the motion in that case was denied, we think the ruling in this case is the better one, and we adhere to it. (See the statement as to *Church v. Church*, in the opinion of this court filed on the 29th of July, 1885, *ante* page.

The order originally made in this case will stand as made.

MORRISON, C. J., ROSS, J., SHARPSTEIN, J., and MYRICK, J., concurred.

McKEE, J., dissented.

MR. JUSTICE MCKINSTRY, being ill, took no part in this decision.

[No. 9702. Department Two.—July 28, 1885.]

J. M. CREIGHTON, RESPONDENT, v. THE KAWEAH CANAL AND IRRIGATION COMPANY, APPELLANT.

WATER—DIVERSION—NATURAL CHANNEL.—The diversion of water from a water-course will not be restrained at the suit of one who owns land located on another water-course to which the former is an occasional tributary, unless such diversion diminishes the quantity of water which would otherwise have flowed into the other water-course by a natural channel, and shortens the period of the natural flow, and it will be restrained only as to such quantity and period.

APPEAL from an order of the Superior Court of Tulare County refusing a new trial.

The facts are stated in the opinion of the court.

Brown & Daggett, for Appellant, cited Angell on Water-courses, 7th ed., § 141; Washburn on Easements, 3d ed., pp. 385–393; Gould on Waters, § 225; Wood on Nuisances, § 399.

Atwell & Bradley, for Respondent, cited *Gillett v. Johnson*, 30 Conn. 180; *Earl v. De Hart*, 12 N. J. Eq. 280; *Creighton v. Evans*, 53 Cal. 55; *Wilcox v. Hausch*, 64 Cal. 461; Gould on Waters, § 225.

MYRICK, J. — Action to restrain the diversion of water. The plaintiff is the owner of land located on a water-course called Bates' Slough. The defendant uses a portion of the channel of Deep Creek (another water-course) as a portion of its ditch, and placed a dam across Deep Creek, at a point where, it is claimed by plaintiff, the waters thereof would flow into Bates' Slough, and by means of such dam caused the waters to be turned into its ditch, thus preventing the water from flowing into Bates' Slough. We are not agreed upon the proposition that the evidence shows the existence of a natural water-course from Deep Creek to Bates' Slough; nor are we agreed that the findings established the existence of such natural water-course. There is no doubt that a channel now exists and has existed there since the digging of the reclamation ditch, about 1870; but the doubt relates to the existence of a well-defined natural water-course prior to the digging of the reclamation ditch. We are, however, agreed upon a proposition on which the judgment will have to be reversed. The defendant was restrained from "maintaining or keeping any dam in the cut or channel leading from Deep Creek into Bates' Slough, or in Deep Creek, or in any manner interfering with or obstructing the free flow of the waters in said Deep Creek or in said cut or channel, or into said Bates' Slough, or diverting any water from either of the same."

There is no evidence to show a *continuous* flow of water in a natural channel from Deep Creek to Bates' Slough; the most the evidence tends to show is that at high water, during spring freshets, in some years, water flowed in a depression to Bates' Slough. At best the plaintiff would be entitled only to have the defendant enjoined from obstructing the flow of that which would have *naturally* flowed, unaided by artificial means with which he [the plaintiff] is not connected. If there was a natural water-course from Deep Creek to Bates' Slough, through which water flowed, say for two months in the year, and say to the amount of one hundred inches, and if the defendant uses the channel of Deep Creek as a portion of its ditch, it will not be restrained from taking its water out of the channel of Deep Creek, unless such taking out diminishes the *quantity* which would otherwise have flowed by a *natural channel* into Bates'

Slough, and shortens the period of the natural flow; and it will be restrained only as to such quantity and period.

Order reversed and cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 20060. Department Two.—July 28, 1885.]

THE PEOPLE, RESPONDENT, v. FIDELE BEZY,
APPELLANT.

CRIMINAL LAW—EVIDENCE—THREATS AGAINST BROTHER OF DECEASED.

—On a trial for murder, threats made by the defendant against a person other than the deceased are admissible in evidence only under circumstances which show some connection with the injury inflicted on the deceased; and the fact that the person against whom the threats were made was the brother of the deceased and lived with him is insufficient to justify the admission of the evidence.

ID.—CHARACTER OF DECEASED.—Evidence of the character of the deceased for peace and quietness is inadmissible against the defendant.

ID.—PRACTICE—OPENING STATEMENT FOR DEFENDANT.—In his opening statement to the jury, counsel for the defendant may be restricted by the court to a statement of the facts which he expects to prove without any argument upon the same.

APPEAL from a judgment of the Superior Court of the county of Fresno, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

W. D. Tupper, for Appellant.

Evidence of threats against the brother of the deceased were improperly admitted. (*People v. Stonecifer*, 6 Cal. 405.) So evidence as to the character of the deceased. (*People v. Murray*, 10 Cal. 310.)

Attorney-General Marshall, for Respondent.

It was a legal exercise of discretion by the court to restrict the counsel for defendant from argument in his opening statement. (Pen. Code, § 1093, subd. 3, 5; *People v. Williams* 43 Cal. 349.)

THORNTON, J. — The defendant was accused of the murder of John Mengetti, and on his trial the court admitted evidence

against objection of certain threats made against Joe Mengetti. Joe Mengetti was the brother of the deceased, and the evidence shows that they lived together, and were cousins and neighbors of defendant. While threats against the deceased are admissible in evidence to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased. We are of opinion that the circumstances under which the threats were made are not sufficient to show such connection as justified the admission of the evidence. It may be said that the evidence was admissible as to the general character of defendant for peace and quietness, but evidence of particular facts is not admissible on such issue. We think the court fell into an error in admitting the evidence above referred to, and as it is not clear that this testimony did not operate prejudicially to the defendant, we are of opinion that it must cause the reversal of the judgment and the order denying the motion for a new trial.

There was also evidence of threats (in Julius Hedrick's testimony) against the Mengettis, which we think was admissible.

The court erred in permitting the prosecution to give evidence as to the character of the deceased for peace and quietness. (*People v. Anderson*, 39 Cal. 704.)

The court committed no error or abuse of discretion in restricting counsel for defendant in his opening statement to stating what he expected to prove, without any argument upon such facts. (*People v. Anderson*, 44 Cal. 65.) The counsel had abundant opportunity in the course of the trial in suggesting and arguing all points of law pertinent to the cause.

For the errors above pointed out the judgment and order should be reversed and the cause remanded for new trial, and it is ordered accordingly.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 20085. Department Two.—July 28, 1885.]

THE PEOPLE, RESPONDENT, v. THOMAS NEASON,
APPELLANT.

CRIMINAL LAW—PRIOR CONVICTION—PRACTICE.—The defendant was accused by information of the crime of burglary, and was convicted of burglary in the first degree; and sentenced to fifteen years imprisonment in the State prison. The information contained a charge that the defendant had been previously convicted of petit larceny. To the latter charge the defendant was allowed to plead guilty, no evidence was introduced to prove the same, and no verdict rendered thereon. *Held*, that inasmuch as the defendant might have been sentenced to fifteen years in the State prison on the conviction of burglary in the first degree without reference to the prior conviction of petit larceny, the proceedings as to the prior conviction might be disregarded and the judgment allowed to stand.

APPEAL from a judgment of the Superior Court of San Diego County.

The facts are stated in the opinion of the court.

Leach & Parker, for Appellant.

Attorney-General Marshall, for Respondent.

MYRICK, J.—The defendant was accused by information of the crime of burglary, and was convicted of burglary in the first degree, and sentenced to fifteen years imprisonment in the State prison. The information contained a charge that the defendant had been previously convicted of petit larceny. One point only is presented on this appeal, viz.: The defendant being charged with having suffered the previous conviction of petit larceny was allowed to admit and plead guilty to that charge, and no evidence was introduced to prove the same, nor any verdict rendered thereon. The defendant refers to the decision of this court in *People v. King*, 64 Cal. 338, as authority that the proceedings in this case show error. The difference in the two cases is this: In *People v. King* the defendant was accused of the crime of petit larceny, and a former conviction of felony, in which case the conviction for petit larceny would not justify imprisonment in the State prison unless the proceedings as to the former conviction were regular; while in the case before us, upon conviction for burglary in the first degree the defendant might have been sentenced to fifteen years in the

State prison, independent of the former conviction for petit larceny. The proceedings in this case as to petit larceny may be laid aside, and the judgment stand, no error appearing.

Judgment affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 9729. Department Two.—July 28, 1885.]

CHARLES E. FLEMING, RESPONDENT, v. A. J. W. ALBECK,
APPELLANT.

PLEADING—GENERAL DEMURRER.—A general demurrer addressed to the whole of a complaint should be overruled if some portion of the complaint states a cause of action.

PRACTICE—SPECIFICATION OF ERRORS.—Where the specification of errors in a statement of the case on motion for a new trial does not comply with the statute, it will be disregarded on appeal; but if a particular error is sufficiently indicated, it will be considered, although the place where it is found is not correctly given, and it is not numbered to correspond with the specification.

LIBEL—EVIDENCE—DAMAGE.—In an action for libel, where the complaint contains no averment of special damage, it is error to permit a witness to state his opinion as to the amount of damage the plaintiff has sustained.

ID.—PART OF PUBLICATION NOT LIBELOUS PER SE.—Where the alleged libel consists of two distinct parts, one of which is not libelous *per se*, this part should be distinguished from that which is libelous.

APPEAL from a judgment of the Superior Court of the county of Merced, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Ostrander & Knox, and *Dunne & Davidson*, for Appellant.

Evidence cannot be introduced to prove general damage. (*Andrews v. Jones*, 10 Ala. 400; *Bank of Mobile v. Borland*, 5 Ala. 531, 546; *Lincoln v. S. & S. R. R. Co.* 23 Wend. 425; *Herrick v. Lapham*, 10 Johns, 281; *Baylis v. Lawrence*, 11 Ad. & E. 105; *Hunt v. Bennett*, 19 N. Y. 173.)

Bennett, Wigginton & Creed, for Respondent.

The specification of errors should be disregarded. (Code Civ. Proc. § 659; *Douglas v. Fulda*, 54 Cal. 588; *Thompson v. Patterson*, 54 Cal. 545, 546; *Carter v. Allen*, 4 West C. Rep. 385.)

MYRICK, J. — Action for libel. The alleged libel consists in the publication of a card in which the plaintiff was charged with having accused the defendant of setting fire to his (the defendant's) building. The card also contained a letter; at the foot of the letter occurs the following: "I wonder if the under sheriff, C. E. Fleming, has caused some one to send the above epistle to me?"

The complaint was demurred to, which demurrer was overruled. This ruling was correct because the demurrer was general, addressed to the whole complaint; and as in a portion of the complaint a cause of action was stated, a general demurrer was properly overruled.

Many erroneous rulings in regard to evidence appear in the transcript which cannot be ground for reversal, for the reason that the statement does not comply with the statute as to the specification of errors. We quote one specification as a sample of many others: "The court erred in overruling defendant's objection to question put by plaintiff's counsel to witness H. W. French, marked in the foregoing statement exception No. 1, and found in lines 10 and 23, page 10." Three other specifications in similar language, the exceptions numbered 2, 3, and 4, respectively, refer to the same witness, and a page and line are stated as to each. On looking through the transcript we find no exception numbered or marked, and at the pages indicated we find nothing relating to the points endeavored to be presented. In only one instance out of ten does the specification tend to point out the error, and that is in reference to the witness Howell, and because but one exception appears in connection with his examination. For that reason we can notice that exception, although the place where found is not correctly given, and it is not numbered. The witness was asked what in his opinion would be the fair amount of money in compensation for plaintiff's damages? This was error. No special damage was averred in the complaint, nor cause for special damage stated; therefore the jury and not the witness was to say what damage had been sustained.

As the case goes back for a new trial we will say that the letter contained in the card as published is not libelous without an *innuendo*, and should have been distinguished from that part of the card which was libelous.

Judgment and order reversed and cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

[No. 9552. Department Two.—July 28, 1885.]

JAMES FISHER, RESPONDENT, v. SOLOMON SWEET,
APPELLANT.

PARTNERSHIP—WHAT CONSTITUTES.—The plaintiff and defendant purchased certain lands jointly for the purpose of farming and eventually selling the same. Some time after such purchase the parties entered into an agreement by which the plaintiff was to conduct the farming operations, and the defendant to attend to shipping and selling the produce, the parties to share expenses equally, and after paying a reasonable compensation to the plaintiff for his services and the use of his teams and tools, to divide the net proceeds equally between them. *Held*, that these facts constituted a partnership between the parties with respect to the lands and the farming of the same.

ID.—ACTION BETWEEN PARTNERS.—A partner cannot maintain an action at law against his co-partner to recover his proportion of the partnership proceeds until the accounts of the firm have been settled.

ID.—EVIDENCE.—In an action at law or in equity, if the plaintiff offers evidence tending to show that the defendant has received moneys growing out of their adventures, whether as joint owners or as co-partners, the defendant will be entitled to show that such moneys have been disbursed in the due course of the business.

APPEAL from a judgment of the Superior Court of Tulare County, and from an order refusing a new trial.

The facts sufficiently appear in the syllabus and the opinion of the court.

Brown & Daggett, and *Atwell & Bradley*, for Appellant.

The relation between the parties was that of partnership. (Civ. Code, § 2395; *Parsons on Partnership*, 2d ed. p. 6; *Reynolds v. Pool*, 84 N. C. 37; *Clark v. Gridley*, 49 Cal. 106; *Harris v. Hillegass*, 54 Cal. 463; *Beauregard v. Case*, 91 U. S. 134; 3 Kent. Com. 24.) Plaintiff cannot recover until the accounts have been adjusted. (*Parsons on Partnership*, 2d ed. p. 270; *Ross v. Cornell*, 45 Cal. 133; 5 Wait's Actions and Defenses, 145, § 5.) Evidence as to dis-

bursements made by the defendant should have been admitted. (*Jackson v. F. R. W. Co.* 14 Cal. 24; *Harper v. Lamping*, 33 Cal. 648; *Neal v. Neal*, 58 Cal. 288; *Eddy v. Smith*, 13 Wend. 490.)

McAllister & Bergin, also for Appellant.

One partner cannot sue another at law until the partnership accounts are closed. (*Williams v. Henshaw*, 12 Pick. 378; *Rider v. Wilson*, 103 Mass. 28; *Gummersall v. Gummersall*, 14 Allen, 61; *Dorr v. McKinney*, 9 Allen, 359; *Buel v. Boughton*, 2 Denio, 93; *Eddy v. Smith*, 13 Wend. 490; *Lockwood v. Kelsea*, 41 N. H. 188; *Clark v. Gridley*, 49 Cal. 108; *Ross v. Cornell*, 45 Cal. 136; *McCord v. Oakland Quicksilver Mining Co.* 64 Cal. 134; *Marvin v. Mandell*, 125 Mass. 562; *Hawks v. Hawks*, 124 Mass. 460; *Howard v. Howard*, 16 Gray, 354; *Briggs v. Page*, 13 Cal. 641.) The court erred in its rulings on the evidence. (*Chandler v. Allison*, 10 Mich. 477; *Thompson v. Richard*, 14 Mich. 72; *Detroit and Milwaukee R. R. Co. v. Van Steinburg*, 17 Mich. 90; *Wilson v. Wagar*, 26 Mich. 457; *Haynes v. Ledyard*, 33 Mich. 321; *Ferguson v. Rutherford*, 7 Nev. 389; *Rush v. French*, 1 Ariz. 99.)

Bennett & Wigginton, and *T. M. McNamara*, for Respondent.

The relation between the parties was not a partnership. (*Bawder v. Lasher*, 5 Lans. 335.)

MYRICK, J. — The rulings in this case appear to have been consistent with the theory of the case adopted by the court; but we think that theory incorrect. The complaint is for money had and received and for services; the plaintiff averring that he and defendant were the owners of certain lands, and that said lands were farmed and ultimately sold, and defendant having received the proceeds thereof, and the proceeds of certain individual property of plaintiff, had failed to pay to the plaintiff his proportion, as well as compensation for his services in and about the farming of the lands. The defendant after denying the receipt by him of the proceeds of sales, averred a partnership between himself and plaintiff, and that all the transactions con-

cerning the said lands and the crops thereof were partnership transactions, and that there had been no final settlement of such partnership affairs.

We are of opinion that the plaintiff's evidence shows the existence of a partnership between plaintiff and defendant as to the lands purchased by them, and as to farming the same, and that plaintiff cannot recover in an action at law, at least until the accounts have been settled.

We are also of opinion that in an action at law or in equity, if plaintiff offered evidence tending to show that defendant had received moneys growing out of their adventures (whether as joint owners or as co-partners), the defendant would be entitled to show that such moneys had been disbursed in the due course of the business, and that whether the disbursement had been by the defendant in person or by the mercantile firm of which he was a member.

It is not necessary to point out each particular ruling and show its error; it is sufficient to say that the case was tried upon a wrong theory. There should have been an accounting between the parties. It was not necessary to have made the members of the firm of Sweet & Co. parties to this action; they had no interest in the partnership affairs as such; they were as to plaintiff and defendant merely factors, agents, account-keepers. Payments made by Sweet & Co., in and about the business of plaintiff and defendant, as such factors and agents, should certainly be taken into account in adjusting the affairs of plaintiff and defendant. How else could equity, even common justice, be done between them?

In the action before us, the only recovery which could be had by plaintiff would be of moneys received by defendant as proceeds of the individual property of plaintiff; and as to such moneys the court erred in not permitting the defendant to show the direction in which those moneys had been disbursed.

Judgment and order reversed and cause remanded.

THORNTON, J., and SHARPSTEIN, J., concurred.

Hearing in Bank denied.

[No. 20046. Department Two.—July 28, 1885.]

THE PEOPLE RESPONDENT, v. JOSÉ F. VIERRA,
APPELLANT.

CRIMINAL LAW—COMMITMENT—DESIGNATION OF OFFENSE—INFORMATION.—The district attorney in drawing up an information under section 800 of the Penal Code is not required to charge the offenses designated by the committing magistrate in his indorsement on the depositions taken at the preliminary examination, but must charge the offense which is disclosed by the depositions themselves.

APPEAL from a judgment of the Superior Court of the County of Fresno, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Tupper & Tupper, for Appellant.

Attorney-General Marshall, for Respondent.

THORNTON, J. — The defendant was accused by information of murder, and was convicted of manslaughter. On his arraignment his counsel moved the court to set aside the information, on the ground that the commitment holding defendant to answer in the complaint filed in the committing magistrate's court ordered that the defendant be held to answer for the crime of manslaughter, and the information filed against him accuses him of murder. The defendant further moved that the district attorney be directed to file an information against defendant for manslaughter.

In support of this motion, counsel for defendant read the complaint filed with the magistrate which charged the defendant with murder, and also read the commitment and order of the magistrate indorsed on the complaint, which is in these words: "It appearing to me that the offense of manslaughter has been committed, and that there is sufficient cause to believe that José F. Vierra, the defendant, guilty thereof, that the said defendant did wilfully, unlawfully, and feloniously cut and stab about the abdomen one Manuel Maria, with a certain dirk knife about the abdomen, a human being, from the effects of said, the said named, the said Manuel Maria soon after died. I order that the said José F. Vierra be held to answer to the same and

committed to the sheriff of the county of Fresno, and that he be admitted to bail in the sum of \$3,000, and is committed to the sheriff of the county of Fresno until he give such bail."

The court denied the motion and defendant excepted.

The proceeding by information for a capital offense is one which has come into use under the present Constitution adopted in 1879. (Const. art. i. § 8.) Under the former Constitution an indictment was required. (Const. of 1849, art. i. § 8.) The section of the present Constitution authorizing the proceeding by information is as follows: "Section 8. Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law. A grand jury shall be drawn and summoned at least once a year in each county."

The defendant on his arrest must be taken before a magistrate (Pen. Code, §§ 821, 822), who must proceed to examine the case. (Pen. Code, §§ 858, 859, 860.) The testimony of each witness, in cases of homicide, must be reduced to writing, as a deposition, by the magistrate or under his direction. (Pen. Code, § 869.) The testimony must be authenticated in the mode set forth in the section last cited, and the depositions must be returned to the clerk of the court at which the defendant is required to appear, together with the warrant, undertakings of bail, etc. (Pen. Code, §§ 869, 883.)

It is provided by section 872 of same Code that when it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or indorse on the depositions an order signed by him, to the following effect: "It appearing to me that the offense in the within depositions mentioned (or any offense, according to the fact, stating generally the nature thereof), has been committed, and that there is sufficient cause to believe the within named A B guilty thereof, I order that he be held to answer to the same, and be committed to the sheriff of the county of——."

It is further provided (Pen. Code, § 809), that "when a defendant has been examined and committed, as provided in section 872 of this Code, it shall be the duty of the district

attorney, within thirty days thereafter, to file in the Superior Court of the county in which the offense is triable, an information charging the defendant with such offense."

The contention of defendant here is that the offense with which the defendant must be charged by the information to be filed is the offense designated by name by the committing magistrate in the indorsement on the depositions, required to be made by section 872 of the Penal Code, and not the offense disclosed by the depositions. We use the expression, "disclosed by the depositions," for that in our opinion is the signification of the words, "in the depositions mentioned," used in section 872. The offense by name need not be nor is it usually mentioned or designated *by name* in the depositions. The facts showing the nature and degree of the offense appear therein. Must the district attorney act on the facts as appearing in the depositions, or must he take the judgment of the committing magistrate thereon as shown by the name by which he shall designate the offense in his indorsement? The committing magistrate is usually a justice of the peace, either unlearned in the criminal law, or acquainted with it to a limited extent. It would be a strange requirement which permitted the justice to determine the offense for which the defendant should be prosecuted, instead of the district attorney, who is selected on account of his learning in the law, and especially charged with duties requiring an acquaintance with the criminal law. In England where prosecutions were allowed by information they were made by the attorney-general or by the solicitor-general when the office of attorney-general was vacant, or by the king's coroner or attorney in the King's Bench. The officers first named acted on their own official discretion without the interference of the court and without previous examination. (Bishop's Criminal Procedure, § 143, and Blackst. Com. 308.) Such proceeding was only allowed in England in cases of misdemeanor, except misprison of treason, and was not permissible in any felony. But the higher the nature of the offense, it is clear that for the protection of defendant, as well as of the State, that the duty should be vested upon an officer acquainted with the law concerning crimes and offenses.

It may be conceded that the power to designate the offense for which the defendant is to be put upon his trial might be vested

by the legislature in the committing magistrate, but the statute must be expressed in terms other than those in which we find them in the Code to justify this court in coming to such a conclusion.

In our opinion section 809 refers to the offense shown by the testimony disclosed in the depositions taken on the preliminary examination before the committing magistrate, and not to the offense designated by name, or even generally, by such magistrate in his indorsement made on the depositions. It will be observed that the offense is to be designated *according to the fact*. Where is the fact to be found? Manifestly in the testimony contained in the depositions. If the justice named an offense which the testimony had no tendency to show had been committed, must the district attorney still charge such offense in the information? Clearly not. The district attorney is to act on the depositions, and to prefer the information charging the offense which the facts disclosed in such depositions show, or tend to show, has been committed by the defendant. For this purpose among others the depositions are required to be returned to the court at which the defendant is to appear. The provision in the Constitution requiring an examination and commitment is to secure persons accused of crime from being proceeded against until there has been a preliminary trial before some judicial officer to determine whether there is a reasonable or probable cause for putting the defendant on his trial. When this is done, and the defendant is held to answer, the constitutional requirement has been complied with. The responsibility is then thrown on the district attorney to determine from the testimony above referred to the offense to be charged in the information. We see no reasonable objection to this view. We think it correct, and by it no right of the accused party is impaired, and there is no obstacle to a fair trial of the defendant for the offense charged. We are of opinion that the court below did not err in refusing to set aside the information herein. (*People v. Lee Ah Chuck*, 66 Cal. 662.) The instruction to which our attention is directed it not obnoxious to the objection that it could under no circumstances be correct.

We find no error in the record, and the judgment and order are affirmed.

MYRICK, J., and SHARPSTEIN, J., concurred.

[No. 9896. Department One.—July 30, 1885.]

JOSEPH BROWN, APPELLANT, v. H. M. WILLIS,
RESPONDENT.

PRACTICE—MORTGAGE—ENFORCEMENT OF DEBT.—Under section 726 of the Code of Civil Procedure, a mortgagor cannot be compelled to pay any part of the mortgage debt until a decree is entered for a sale of the premises mortgaged; and he then becomes liable only for such deficiency as shall appear on the sheriff's return.

ID.—SUBSEQUENT MORTGAGE—ACTION BY AFTER FORECLOSURE OF PRIOR MORTGAGE.—The holder of a note secured by a second mortgage cannot, after foreclosure of the prior mortgage by a suit to which he was made a party defendant, and in which all his rights might have been settled, maintain an action on the note against the maker.

APPEAL from a judgment of the Superior Court of San Bernardino County.

The facts are stated in the opinion of the court.

Byron Waters, for Appellant, cited *Mauge v. Heringhi*, 26 Cal. 578; *Hardin v. Ware*, 5 Pac. C. L. J. 317; *Ould v. Stoddard*, 54 Cal. 613; Code Civ. Proc. §§ 442, 726.

C. W. C. Rowell, for Respondent.

The judgment in the former action is conclusive upon all the parties thereto. (*Starr v. Stark*, 2 Sawy. 617, 618; *Freeman on Judgments*, § 249.)

Ross, J. — The findings show that on the 2d day of September, 1878, an action was commenced in the late District Court of the eighteenth judicial district by one Aldrich against the plaintiff and defendant to the present action, H. M. Willis and Joseph Brown, and Amelia Willis, Jr., to foreclose a mortgage that had been given by H. M. Willis as security for a note executed by him to one Drew, Drew having assigned the note and mortgage to Aldrich. Brown was made a party to that action because he held, as assignee, a subsequent mortgage upon the same premises that had been given by Willis to secure a note executed by him November 22, 1875, to one Thomas, and made payable one year after its date. The note held by Brown was, therefore, due at the time of the commencement of the action by Aldrich to foreclose the first mortgage executed by Willis, and

as both Willis and Brown were parties to that action, the court, by its decree, could have settled the respective rights of all of the parties. The purpose of making the holder of the second mortgage, it being of record, a party to the suit to foreclose the first mortgage was, of course, to cut off the equity of redemption. The findings here show that in that action Brown set up his note and mortgage, and as the note was due, if his pleadings were appropriate, as they should have been, the court could and should have ascertained, not only the amount due from Willis to Aldrich on the first note and mortgage, but also the amount due from him to Brown on the second note and mortgage, and by its decree have directed a sale of the mortgaged property, or so much thereof as should be necessary, and the application of the proceeds of the sale to the payment of the costs and expenses of sale, and the amount due, *first*, to the plaintiff Aldrich on the first note and mortgage, and *secondly*, of the amount due to the defendant Brown on the second note and mortgage, and further directing, in the event the sheriff's return should show the proceeds to be insufficient, and a balance to remain due on either or both of the amounts found due by the decree, that judgment be docketed for said balance against the defendant so found personally liable for the debt, which under the law would have become a lien on such real estate as the judgment debtor might have in the county, and on which an execution might have been issued as in other cases. In *Biddel v. Brizzolara*, 64 Cal. 362, it was held that under the provisions of our statute (Code Civ. Proc. § 726), that, whatever the form of the debt, the mortgagor can be legally compelled to pay no part of it until decree is entered for the sale of the premises mortgaged, and the liability which shall then accrue to him is a liability to pay only a deficiency which shall appear on the sheriff's return. "Every person," said Mr. Justice Kent, in *La Guen v. La Gouverneur*, 1 Johns. Cas. 504, 1 Am. Dec. 121, "is bound to take care of his own rights, and to vindicate them in due season, and in proper order. This is a sound and salutary principle of law. Accordingly, if a defendant having the means of defense in his power, neglects to use them, and suffers a recovery to be had against him in a competent tribunal, he is forever precluded."

It results, we think, that the subsequent action brought by plaintiff Brown upon the note executed by defendant Willis to Thomas cannot be maintained.

Judgment affirmed.

McKINSTRY, J., and MCKEE, J., concurred.

[No. 8835. Department One.—July 30, 1885.]

W. G. SOMERS, APPELLANT, v. C. B. OVERHULSER ET AL.,
RESPONDENTS.

EQUITY—RESULTING TRUST.—Where in a purchase of land one person pays the consideration and another takes the title, a trust results in favor of the person paying the consideration; and where only a part of the consideration is paid by him a trust arises in his favor *pro tanto*.

APPEAL from a judgment of the Superior Court of the county of Fresno.

The facts sufficiently appear in the opinion of the court.

E. D. Edwards, and *H. S. Dixon*, for Appellant, cited Cal. Civ. Code, §§ 853, 2224; *Hidden v. Jordan*, 21 Cal. 92; *Case v. Codding*, 38 Cal. 191.

H. C. Tupper, *Tupper & Terry*, and *E. C. Winchell*, for Respondents, cited *Olcott v. Bynum*, 17 Wall. 44.

Ross, J. — It is the settled rule in this State, as elsewhere, that when land is purchased, for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration and the other party becomes his trustee; and, also, that if the one party pays only a part of the consideration, the party taking the title to the whole land becomes a trustee for the other party *pro tanto*. (*Case v. Codding*, 38 Cal. 191.) The facts of the present case bring it within this rule. (See also § 2224, Civ. Code.)

Judgment reversed and cause remanded with directions to the

court below to overrule the demurrer to the complaint, with leave to defendants to answer.

McKEE, J., and McKINSTRY, J., concurred.

[No. 8538. Department One.—July 30, 1885.]

IN THE MATTER OF THE ESTATE OF WM. W. HILL,
DECEASED.

ESTATE OF DECEDENT—UNAUTHORIZED APPROPRIATION BY ADMINISTRATOR—CLAIM AGAINST ESTATE.—An unauthorized appropriation by an administrator of the funds of the estate cannot be made the basis of a claim by him against the estate.

ID.—SURETIES—JUDGMENT AGAINST—PAYMENT—RECOURSE AGAINST PRINCIPAL.—Sureties who have been compelled to pay a debt of their principal have a legal demand for reimbursement, which they may enforce against the principal by personal action if he be alive, or against his estate if he be dead. But in either case reimbursement can only be had for what has been expended.

ID.—SURETIES MUST PAY BEFORE PROCEEDING AGAINST PRINCIPAL.—After the death of the principal, a judgment obtained against the sureties cannot be enforced by them as a claim against his estate until they have paid it.

ID.—ADMINISTRATOR CANNOT ACT UPON INDIVIDUAL CLAIM.—An administrator who is personally interested in a claim against the estate is disqualified from acting upon it.

ID.—MINOR HEIRS—CONSENT OF ATTORNEY TO PAYMENT OF CLAIM—ESTOPPEL.—The consent of an attorney appointed by the court to represent minor heirs, to a sale of real property for the purpose of paying a claim against the estate, does not estop such heirs from afterwards questioning the correctness of the claim upon an accounting by the administrator.

APPEAL from a judgment of the Superior Court of Fresno County settling the final account of an administrator, and from an order refusing a new trial.

On an application for the sale of real property for the purpose of paying the claim in question the attorneys appointed by the court to represent the minor heirs consented to the sale. The further facts are stated in the opinion of the court.

H. S. Dixon, and D. S. Terry, for Appellants.

Sayle & Harris, and Bennett & Wigginton, for Respondent.

McKEE, J. — This is an appeal by the heirs-at-law and distributees of the estate of W. W. Hill, deceased, from a judgment

settling and allowing the final account of the administrator of the estate, and from an order denying a new trial.

The principal question for adjudication arises out of a claim against the estate for \$40,627. The claim was presented to the administrator on the 9th of May, 1877, for allowance or rejection, and was allowed by the administrator and approved by the probate judge on the same day. In the course of administration payments were made upon it from time to time, which the Superior Court sitting as a court of probate, approved and credited the administrator with in the settlement of his final account. This approval and settlement it is contended was erroneous because the claim was one in which the administrator was personally interested, which was not chargeable against the estate, and its allowance and the payments thereon were fraudulent and void.

The basis of the claim is an official bond given by W. W. Hill in his lifetime as treasurer of Fresno County. While in office, Hill died intestate on the 3d of February, 1874. After his death the county having discovered that he was at the time of his death short in his accounts to the extent of \$56,000, commenced an action against the sureties upon his official bond to recover the amount of his defalcation. The action was commenced on the 30th of July, 1874, and on the 6th of December, 1875, judgment was entered therein against the sureties upon the bond, for the amounts of their respective obligations for which each was adjudged liable as follows, namely: Against A. H. Burrough, for \$1,000 and costs; F. B. Duff, \$1,000 and costs; Frank Dusy, \$500 and costs; William Faymonville, \$1,500 and costs; J. C. Hoxie, \$2,000 and costs; William Ingram, \$2,000 and costs; E. Jacob, \$2,000 and costs; Joseph Kincaid, \$500 and costs; Alexander Kennedy, \$2,000 and costs; J. P. Lane, \$1,000 and costs; W. S. Powell, \$2,500 and costs; Jonathan Rea, \$5,000 and costs; T. W. Simpson, \$2,000 and costs; J. G. Simpson, \$1,000 and costs; John Sutherland, \$20,000 and costs; A. H. Statham, \$5,000 and costs, and Justin Esrey, \$5,000 and costs. On appeal the judgment was affirmed by the Supreme Court, and the remittitur was filed in the District Court on the 9th of April, 1877.

A. H. Statham, one of the sureties upon the bond, against whom judgment was rendered for \$5,000 and costs, was the duly

qualified administrator of the estate. Notice to creditors of the estate to present their claims within ten months as required by law had been duly given by publication of notice commencing on the 11th of March, 1874, and ending on the 8th of April, 1874. No claim upon the bond against the estate was ever presented by the county. To the action commenced against the sureties on the bond the estate was not made a party. The action was commenced and prosecuted to judgment against the sureties only; and after the judgment was affirmed by the Supreme Court, three of the sureties on the bond, namely, Sutherland, Esrey, and Morrow, claiming to act for themselves, and as "trustees and attorneys in fact," for the other sureties, including Statham, who was also administrator of the estate, made out and presented to the administrator a claim in substance as follows:—

"Estate of W. W. Hill, deceased, Dr. to Justin Esrey, T. W. Simpson, J. C. Hoxie, Alexander Kennedy, F. B. Duff, Jonathan Rea, J. P. Lane, Frank Dusy, W. S. Powell, Wm. Ingram, J. G. Simpson, Wm. Faymonville, John Sutherland, Elias Jacob, M. J. Church, A. H. Statham, Henry Burrough, Joseph Kincaid, and Jesse Morrow, \$40,627.27, for the amount of a judgment recovered on the 6th of December, 1875, by the county of Fresno against them as sureties upon the official bond of W. W. Hill, late treasurer of said county for defalcation in office, and affirmed on appeal to the Supreme Court the 27th day of January, 1877," the remittitur from said court being filed in the court in which the judgment was rendered on the 9th of April, 1877, "which judgment said claimants are compelled to pay on account of the defalcation of said W. W. Hill, deceased, their principal in said bond." The claim was supported by the following affidavit:—

"STATE OF CALIFORNIA, }
COUNTY OF FRESNO. }

Jesse Morrow, Justin Esrey, and John Sutherland, Sr., for themselves and as the attorneys in fact for T. W. Simpson, J. C. Hoxie, Alex. Kennedy, F. B. C. Duff, Jonathan Rea, J. P. Lane, Frank Dusy, W. S. Powell, William Ingram, J. G. Simpson, William Faymonville, Elias Jacob, M. J. Church, A. H. Statham, Henry Burrough, Joseph Kincaid, whose foregoing claim is herewith presented to A. H. Statham, the admin-

istrator of the estate of said deceased, being duly sworn says each for himself, and not one for the other, that the amount thereof to wit, the sum of \$40,627.27 in gold coin is justly due to said claimants. That no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said Justin Esery, Jesse Morrow, and Jonathan Sutherland

[Signed]

JESSE MORROW,
JOHN SUTHERLAND, SR.,
JUSTIN ESERY.

Subscribed to and sworn before me this 9th day of May,
A. D., 1877.

[Signed]

C. G. SAYLE,

[NOTARIAL SEAL.]

Notary Public."

Thus supported the claim was presented and indorsed as follows:—

"No. 81 — Probate Court, Fresno County. — In the matter of the estate of W. W. Hill, deceased. — Claim of the official bondsmen of said deceased for \$40,627.27. The within claim presented to A. H. Statham, administrator of said deceased, is allowed and approved for \$40,627.27, this 9th day of May, 1877. [Signed] A. H. Statham, Administrator. Allowed and approved for \$40,627.27 this 9th day of May, 1877. [Signed] Gillum Baley, Probate Judge. Filed 9th May, 1877. [Signed] A. M. Clark, Probate Clerk."

The claim was therefore presented, allowed and approved as a claim due and payable by the estate to the claimants.

But the evidence proves, beyond a reasonable doubt, that the claim was not for a demand against the estate then due and payable to the claimants, and that its allowance by the administrator, as a claim of that character, was the result of a collusive understanding and arrangement between the administrator and his co-sureties, upon the bond of the intestate, to relieve himself and them from their obligations on the bond at the sacrifice of the estate.

For the uncontradicted evidence shows that when the claim was presented to the administrator the sureties had not paid the judgment. On the very day that the claim was made out they met to consider ways and means for its payment. At that

meeting the district attorney of Fresno County proposed, if they would pay the costs in the case the county would extend time for payment of the judgment. That proposal was accepted, and for the purpose of acting accordingly, and also providing for the payment of the judgment, they appointed three of their number, namely, Sutherland, Esery and Morrow, to act as "trustees and attorneys in fact for them"; and by a power of attorney which was duly executed, acknowledged and recorded, they empowered them "for us and in our names, etc., and for our use and benefit to ask, demand, sue for, recover, etc., all such sums of money, debts, etc., as are now or shall hereafter become due . . . to us from the estate of W. W. Hill, deceased, or his heirs, or legal representatives, and have, use, and take all lawful ways and means in our names or otherwise for the recovery thereof by attachment, etc., or otherwise . . . and other sufficient discharges in our names to make, seal, and deliver, to bargain, contract, agree for, purchase, receive, and take lands, tenements, etc., and accept seizin and possession of all lands, . . . and to lease . . . bargain, sell . . . convey, mortgage, etc., lands, etc. Also to bargain and agree for, buy, sell, mortgage, etc., and in every way and manner deal in and with goods, wares and merchandise, choses in action, and other property in possession that may be received by them from the said estate of W. W. Hill, deceased, or his heirs or legal representatives, and to make, do, and transact all and every kind of business of what nature or kind soever as they may deem beneficial to our interest in connection with our claim against the said estate of W. W. Hill, deceased, his heirs and legal representatives."

Satham, the administrator of the estate, attended the meeting, signed and acknowledged the power of attorney, and participated in the plan arranged for the payment of the costs to the district attorney, and the ultimate payment of the judgment. The result was the "trustees and attorneys in fact of the sureties," on the same day, borrowed \$1,248, which they paid to the district attorney, and Satham appropriated for the same purpose \$2,000 in his hands as administrator, which being paid over in satisfaction of the costs in the action, the claim against the estate was made out by the "trustees," and presented to the administrator, who immediately allowed and approved it.

The entire basis of the claim as an absolute demand against the estate was this payment.

The appropriation by the administrator of \$2,000 of the estate for his individual purposes was an unauthorized and illegal act; an unauthorized appropriation of funds of an estate cannot be made the basis in whole or in part of a claim against the estate. The payment made by the sureties on the judgment, therefore, only amounted to \$1,248, and the administrator knew the fact. Being examined as a witness in his own behalf he testified: "When the claim was presented to me, I knew of no payment having been made to the county by any of the claimants except the sum of \$3,248, and \$2,000 of that I paid out of the estate; the rest was paid by the trustees of the claimants." Yet, with that knowledge and the knowledge of his own interest in the claim, he allowed the claim presented to him for \$40,627.27 as justly due and owing by the estate to the claimants.

There is no doubt that sureties who are compelled to pay a debt of their principal have a legal demand for reimbursement which they may enforce against him by personal action if he be alive, or against his estate if he be dead. But in either case reimbursement can only be claimed for what has been expended. (§§ 2847, 2848, Civ. Code.) Here the demand did not accrue until after the death of the principal, and for any moneys paid by them the sureties had an absolute demand against the estate which they were legally entitled to enforce according to law. But \$1,248 was all that was legally paid by them, and for that sum no claim against the estate was ever presented. The unpaid judgment against them was not an absolute, provable claim against the estate; it was merely a possible or contingent claim, arising out of their adjudicated connection with the bond of the intestate, which might never become absolute; for the sureties may not have been able to pay the judgment against them, and the judgment might never have been enforced. At all events, until payment *they* had no enforceable demand against the estate for the amount of the judgment. (§§ 709, 1059, Code Civ. Proc.)

In *Pico v. De la Guerra*, 18. Cal. 422, a claim against an estate was predicated upon a guaranty to indemnify a surety upon a promissory note. Before the note became due and payable the guarantor died, and the surety, before he had paid the note,

presented a claim upon the guaranty, which the executor allowed and approved; but the allowance and approval were held unauthorized and void, because as the claim against the estate was merely contingent upon payment by the surety of the promissory note of his principal, no cause of action accrued until the contingency happened, and no recovery could be had against the estate, either by the presentation of an immature claim, or by suit at law against the estate.

So it was in the proceedings in hand. The alleged claimants were liable as debtors of Fresno County for the judgment recovered against them as sureties upon the official bond of the intestate; but they were not creditors of the estate holding an enforceable demand against it for the amount of that judgment, because they had not paid the judgment; and until payment thereof they were not entitled to proceed against the estate to enforce its payment in the course of administration. Besides, as the administrator himself was personally interested in the claim, he was disqualified by law from acting upon it. (§ 1510, Code Civ. Proc.)

The minor heirs are not estopped from questioning the correctness of the administrator's account by reason of the proceedings in the Probate Court for a sale of the real property to pay the alleged claim.

It results that the payments made by the administrator upon this claim and allowed him by the Probate Court on the settlement of his account were erroneously allowed.

Judgment and order reversed and cause remanded for further proceedings.

ROSS, J., and MCKINSTRY, J., concurred.

Hearing in Bank denied.

[No. 8255. Department One.—July 30, 1885.]

PAULINA WEIHE ET AL., APPELLANTS, v. A. H. STATHAM
ET AL., RESPONDENTS.

ESTATE OF DECEDENT—FRAUDULENT SALE OF LAND BY EXECUTOR.—Under section 1572 of the Code of Civil Procedure, one having an estate of inheritance in land fraudulently sold by an executor or administrator, may maintain an action against him to recover double the value of the land sold; but that section does not authorize an action against the sureties on his official bond.

ID.—NEGLECT OF EXECUTOR IN RELATION TO SALE—ACTION TO RECOVER FOR—ACTUAL DAMAGE—PLEADINGS.—In an action under section 1571 of the Code of Civil Procedure, to recover on the bond of an executor or administrator, for his neglect or misconduct in the proceedings in relation to a sale of the real estate of the deceased, the complaint must show that the plaintiff has been actually damaged by the sale; and where the complaint contains no averments with respect to any proceedings in the Probate Court subsequent to the confirmation of the sale, and affirmatively shows that the land was sold for its full value, no damage is alleged, and the plaintiff will be left to his remedy in the Probate Court.

APPEAL from a judgment of the Superior Court of Fresno County.

The facts are stated in the opinion of the court.

H. S. Dixon, for Appellants.

Bennett & Wigginton, and *Sayle & Harris*, for Respondents.

ROSS, J. — The complaint, a demurrer to which was sustained by the court below, alleges, among other things, the decease of Wm. W. Hill, the appointment of an administratrix of his estate, the statutory publication of notice to creditors, the expiration of the statutory time for the presentation of claims against the estate, the payment of all claims against it "except for some inconsiderable sums which may have been due for expenses of administration," the then marriage of the administratrix, which operated a revocation of her letters, the subsequent appointment of the defendant Statham as administrator, the execution of his bond as such administrator with the defendants Morrow, Sutherland, and Morgan, as sureties thereon, the qualification of the administrator, his subsequent entry upon the duties of the trust, and his receipt of real and personal property of the estate of large value, and then charges in substance that defendant Statham did "fraudulently sell all the real property of the decedent," in that he did on the 9th of May, 1877, enter

into a fraudulent scheme and conspiracy with certain named persons, including two of the sureties on his bond as administrator, whereby those persons, through three of their number, should make, swear to, and present to Statham for allowance as administrator, a pretended claim against the estate in the sum of \$40,627.27, in which Statham was interested to the extent of \$5,000, and whereby Statham as administrator should allow the claim in the full amount for the joint benefit of the parties interested, and that by representing to the probate judge by affidavits that the amount of the claim was justly due to the claimants, procured the approval thereof by the probate judge; that pursuant to such fraudulent scheme the claim was presented to and allowed by the administrator Statham, he then "well knowing that the same and the whole thereof was then and long prior thereto had been barred by the Statutes of Limitation in such case made and provided," and also by the judge of probate; that in further pursuance of the alleged fraudulent scheme, "and finding that proceedings previously taken by him in said Probate Court for, and sales by him previously made to C. G. Sayle and William Glenn of all of the real property of said estate for the purposes aforesaid, were not legal and passed no title to said Parcel No. 1 (of land) especially to said agents and attorneys, who then attempted to hold such title for and on his behalf, and for said other pretended claimants," the defendant Statham as administrator subsequently presented to the Probate Court having jurisdiction of the estate, a petition praying for an order of sale of the real property of the estate for the purpose of paying the debts of the estate and the costs and expenses of administration, and that such proceedings were had thereon as that on the 25th of February, 1878, the Probate Court made an order authorizing defendant Statham to sell the real property of the estate for the purposes stated in the petition for sale; that the proceedings in relation to such sales were in accordance with the provisions of the statute regulating such matters in so far as mere procedure was concerned, but that, as a matter of fact, there were at the time of the presentation of the petition and at the time of the making of the order of sale, no valid debts or claims against the estate except for expenses of administration, and that the

amount of those were exaggerated in the petition; that at the time of making the order for the sale of the real property of the estate, the probate judge required the defendant Statham as administrator to execute an additional bond for the faithful discharge of the duties of his trust, which he did with the defendants Morrow, Faymonville, Esery, and Goforth, as his sureties thereon; that under the order of sale and in further pursuance of the fraudulent scheme, defendant Statham, as administrator, "did, prior to the 22d day of March, 1878, receive a bid from said Glenn, which bid, save so far as said parcel No. 2 is concerned was, as said defendant Statham then well knew, so made in the interest alone of himself and said other pretended claimants, and in order to protect their title thereto then held for them including himself, said Statham, by their said agents and attorneys, for the whole of said real property for and in the sum of \$5,068 for said parcel No. 1, and \$1,880 for said parcel No. 2; and did, on said 22d day of March, 1878, make and file his return of such sales to said Probate Court, upon which he caused to be had such legal and proper proceedings that thereafter, on the 4th day of April, 1878, he did, for the purposes and in behalf of the persons aforesaid, including himself, procure from said Probate Court an order that day duly made and entered, confirming said sales, and directing him as such administrator to convey said lands to said Glenn, whereupon on the same day he did as such administrator execute, acknowledge, and deliver to said Glenn a conveyance of all said lands, who upon the same day did execute, acknowledge, and deliver to said agents and attorneys, for said pretended claimants, all the lands described in said parcel No. 1, and also gave his note for \$1,880, the purchase money for said parcel No. 2, and his mortgage on the lands described in said parcel No. 2, to said Statham as such administrator, who thereupon applied the same to said pretended claim"; that the real property so sold was, at the time of sale, ever since has been and now is of the value of \$6,984, the amount for which it was sold, as we understand the averment of the complaint. The complaint contains the further averment "that all said real property has passed into the hands of innocent purchasers, for value, without notice of said frauds"; that the averments hereinbefore referred to with respect to the fraudu-

lent practices, as to the party verifying the complaint, are made on information and belief; that the facts constituting the alleged frauds did not come to the knowledge of the plaintiffs until March 14, 1881, and "that by said unlawful and fraudulent sales of said real property, plaintiffs are and have been damaged in a large sum of money, to wit, \$13,896," being double the amount of the alleged value thereof, the action being based, as said by plaintiff's counsel, upon section 1572 of the Code of Civil Procedure, which reads: "Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein."

Counsel is mistaken in supposing that this section authorizes the recovery upon the *bond* of the administrator. The preceding one (§ 1571) provides for an action upon the bond in case of neglect or misconduct in the proceedings of the executor in relation to any sale. It reads: "If there is any neglect or misconduct in the proceedings of the executor in relation to any sale, by which any person interested in the estate suffers any damage, the party aggrieved may recover the same in an action upon the bond of the executor or administrator, or otherwise." And this is followed by the provisions of section 1572 which make the *executor* or *administrator*, as the case may be, who fraudulently sells any real estate of a decedent, but not the sureties, liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein. It is evident, therefore, that section 1572 of the Code of Civil Procedure affords no warrant for an action upon the bond of the administrator for the recovery of double the value of the land alleged to have been fraudulently sold by the administrator. Nor does the complaint in question contain sufficient averments to entitle the plaintiffs to recover under the provisions of section 1571, *supra*. The right there given (upon the bond) is to any person interested in the estate who *suffers damage*. The complaint contains no averment with respect to any proceedings in the Probate Court having jurisdiction of the estate of the deceased Hill sub-

sequent to the confirmation of the sale of the land, but does show affirmatively that the land was sold for its full value, to wit, \$6,948. Presumptively, of course, the Probate Court has required, or will require, the administrator to make proper disposition of the money. If it properly belongs to the plaintiffs in the present suit it will doubtless go to them under the decree of the Probate Court. If, under the decree of distribution, they should be awarded the money realized on the sale of the land, shown by the complaint in the present action to have been its true value, they would not be pecuniarily damaged by the alleged misconduct of the administrator, and cannot recover the same amount in another and independent action. In so far as the complaint here shows the remedy of the plaintiffs is in the Probate Court.

Judgment affirmed.

McKINSTRY, J., and McKEE, J., concurred.

[No. 9701. Department One.—July 30, 1885.]

WM. A. SCOLLAY, APPELLANT, v. THE COUNTY OF
BUTTE, RESPONDENT.

MUNICIPAL CORPORATIONS—COUNTIES—POWERS INVOLVING EXERCISE OF JUDGMENT CANNOT BE DELEGATED.—Powers conferred upon a municipal corporation, involving the exercise of judgment and discretion, are in the nature of public trusts, and cannot be delegated to others.

ID.—BOARD OF SUPERVISORS—CONTRACT FOR COLLECTION OF DEBT DUE COUNTY—DELEGATION OF POWER TO CONDUCT LITIGATION.—The board of supervisors of a county has power to contract for the collection of a debt due the county; but in the exercise of that power it has no authority to delegate to others, whom it employs for that purpose, the power to determine whether to commence a suit in the name of the county, and to retain attorneys to manage the prosecution thereof, nor to abdicate its control of such a suit, or make its compromise or settlement dependent upon the consent of strangers.

APPEAL from a judgment of the Superior Court of Butte County.

The facts are stated in the opinion of the court.

Wm. M. Pierson, and H. C. Newhall, for Appellant.

The board of supervisors had power to enter into the contract in question. Such contract is not *ultra vires*. (Pol. Code, §§ 4000, 4003, 4046; 1 Dillon on Municipal Corp. § 89; *Smith v. Sacramento*, 13 Cal. 531; *Hornblower v. Duden*, 35 Cal. 664; *Colusa County v. De Jarnett*, 55 Cal. 373; *Beals v. Evans*, 10 Cal. 459.) The contract being executed, the defendant having received its benefit, is estopped to deny its validity. (Dillon on Municipal Corp. §§ 457, 935, 936; *Meyer v. Brown*, 65 Cal. 583; *Green Bay R. R. Co. v. Union I. Co.* 107 U. S. 98; *Hitchcock v. Galveston*, 96 U. S. 351; *Moore v. Mayor of N. Y.* 73 N. Y. 245; *Oneida Bank v. Ontario Bank*, 21 N. Y. 490; *Argenti v. San Francisco*, 16 Cal. 264; *Pimental v. San Francisco*, 21 Cal. 361; *Pixley v. W. P. R. R. Co.* 33 Cal. 183; *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 542; *Bradley v. Ballard*, 65 Ill. 414; *State Board v. Citizens Street Ry. Co.* 47 Ind. 407; *Hays v. Galion Gas Light etc. Co.* 29 Ohio St. 330; *Railway Co. v. McCarthy*, 96 U. S. 258; *Perkins v. Portland R. R. Co.* 47 Me. 573; *Rutland R. Co. v. Proctor*, 29 Vt. 93; *Oil Creek R. R. Co. v. Penn. T. Co.* 83 Pa. St. 160; *Darst v. Gale*, 83 Ill. 136; *Thompson v. Lambert*, 44 Iowa, 239.)

I. S. Belcher, John C. Gray, Chas. F. Lott, L. C. Granger, and A. F. Jones, for Respondent.

The board of supervisors had no power to make the contract, or to bind the county by its performance. (Pol. Code, §§ 4003, 4046; Cooley on Const. Lim. 233; Potter on Corp. § 544; Dillon on Municipal Corp. §§ 10, 457; *City of Eufaula v. McNab*, 67 Ala. 588; *Branham v. San Jose*, 24 Cal. 585; *Donovan v. Mayor of N. Y.* 33 N. Y. 293; *McDonald v. Mayor of N. Y.* 68 N. Y. 23; *Halstead v. Mayor of N. Y.* 3 N. Y. 430; *School Directors v. Fogleman*, 76 Ill. 189; *Tower of South Ottawa v. Perkins*, 94 U. S. 261; *McCoy v. Briant*, 53 Cal. 247; *Minturn v. Larue*, 23 How. 436; *Linden v. Case*, 46 Cal. 174; *McCracken v. San Francisco*, 16 Cal. 619.) All persons contracting with a municipal corporation are bound to inquire into the power of the corporation or its officers to make the contract; and whenever the contract is *ultra vires*, the corporation may plead its invalidity as a defense to an action founded thereon.

The doctrine of estoppel has no application to such a case. (Dillon on Municipal Corp. § 457; *Donoran v. Mayor, etc.* 33 N. Y. 293; *McDonald v. Mayor, etc.* 68 N. Y. 23; *Halsted v. Mayor etc.* 3 N. Y. 430; *School Directors v. Fogleman*, 70 Ill. 189; *South Ottawa v. Perkins*, 94 U. S. 261; *State v. Kirkley*, 29 Md. 85; *McCoy v. Briant*, 53 Cal. 247; *Martin v. Zellerbach*, 38 Cal. 300; *Marsh v. Fulton Co.* 10 Wall. 676; *Austin v. Coggeshall*, 12 R. I. 329; *Hodges v. Buffalo*, 2 Denio, 110; *Phelan v. San Francisco*, 6 Cal. 531; *San Diego W. Co. v. San Diego*, 59 Cal. 517; *Los Angeles Gas Co. v. Toberman*, 61 Cal. 199; *Mayor v. Ray*, 19 Wall. 469.)

MCKEE, J. — In the year 1876, Butte County was the owner and holder of two hundred railroad bonds of the California Northern Railroad Company, secured by mortgage, the principal and interest of which had become due and payable; but the company would not pay, and the county was desirous of collecting them. Under those circumstances two persons, W. S. Watson, and William Corcoran, proposed to the board of supervisors of the county that they would collect them without attorney's fees, expenses, or costs to the county, for fifty cents on the dollar. The board accepted the proposal, and on the 3d of October, 1876, a written contract to that effect was drawn and signed by the chairman of the board in the name of the county, and by Watson and Corcoran; and the contract thus signed was ratified by the board.

By the terms of the contract the bonds were to be delivered to Watson and Corcoran for collection; they were to commence within sixty days, "proceedings," or "negotiations," or "a proper suit," for their collection and "prosecute the matter without any unnecessary delay," without costs or charges, or attorney's fees, and when collected retain to their own use fifty per cent of the amount collected "in full payment of themselves, their agents, attorneys, and employees employed or engaged in the matter." It was also "mutually understood and agreed that either of the parties hereto may compromise the matter of paying said bonds with said railroad company, upon such terms and conditions as they may deem just and equitable, but no compromise so made shall be final or binding without the express written consent of the parties hereto."

On the 2d of December, 1876, foreclosure proceedings upon the bonds and mortgage were commenced against the railroad company. These were continued for about seven years without other result than the recovery of a final judgment for the principal and interest due upon the bonds; but for the execution of this judgment, so far as appears from the complaint, no steps were taken; and under these circumstances the board of supervisors of the county on the 15th of May, 1883, compromised and settled with the railroad company without the consent, written or otherwise, of Watson and Corcoran, and received from the company \$20,000, which it accepted in full satisfaction of the bonds and release of the mortgage. It is alleged that "when this settlement was made there was due and payable on said bonds the sum of \$47,058.80, which could and would have been collected and received by the county but for the unauthorized compromise and settlement by the board." Five months after this settlement Watson and Corcoran assigned the contract to the plaintiff and appellant, who presented a claim to the board of supervisors for \$23,329.40, due upon said contract. The claim was rejected and hence this suit. The answer of the county to the complaint is that the contract was *ultra vires*.

When the contract was made the powers of the several counties of the State as defined by the legislature were contained in the following sections of the Political Code:—

"Section 4000. Every county is a body politic and corporate, and as such has the powers specified in this Code, or in special statutes, and such powers as are necessarily implied from those expressed.

"Section 4001. Its powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law.

"Section 4003. It has power:—

"1. To sue and be sued.

"3. To make such contracts and purchase and hold such personal property as may be necessary to the exercise of its powers.

"4. To make such orders for the disposition or use of property as the interests of its inhabitants require."

And the board of supervisors as agents of the county were clothed with the following jurisdiction and powers:—

“ Section 4046. The boards of supervisors in their respective counties have jurisdiction and power under such limitations and restrictions as are prescribed by law:—

“ 8. To purchase, receive by donation, or lease, any real or personal property, necessary for the use of the county, preserve, take care of, manage and control the same.

“ 10. To sell at public auction at the court house door after thirty days' previous notice . . . to the highest bidder for cash, any property, real or personal, belonging to the county.

“ 15. To direct and control the prosecution and defense of all suits to which the county is a party.

“ 26. To do and perform all other acts and things required by law, not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government,” etc., etc.

These provisions constituted the charter of the county upon the subjects to which they relate; and for the declared purposes and objects within its jurisdiction, the board could exercise the powers expressly granted to it and those which were necessarily or fairly implied in or incident to them.

Railroad bonds belonging to a county are property upon which the county may sue, and about which the board of supervisors may make such orders as it may deem best for the interests of the county, with reference to the use or disposition of the same, in the mode prescribed for the exercise of its powers. No orders were made for the sale of the bonds in the mode prescribed by subdivision 10 of section 4046, *supra*. The contract was for their collection by negotiations or other proceedings, or by suit. No question is made as to the power of the county to sue. Such a power implies the power to employ an agent to commence and prosecute a suit, unless the law itself has provided for the county a law officer whose duty it is to commence and prosecute suits for the county. Such an officer has been provided in the district attorney, whose duty it is, as the legal adviser of the county . . . “to defend all suits brought against . . . his county, and prosecute . . . all actions for the recovery of debts, fines, penalties, and forfeitures accruing to . . . his county”; and to collect and receipt for the same in his official capacity. (Subd. 3, 4, § 4256, Pol. Code.)

In *Hornblower v. Duden*, 35 Cal. 660, it was held, upon the authority of *Smith v. The Mayor of Sacramento*, 13 Cal. 533, that while the power to employ other counsel than the district attorney to commence and prosecute suits for the county was not expressly conferred on the board of supervisors, it was obviously embraced in the general power to do and perform all such other acts and things as may be strictly necessary to the full discharge of the powers and jurisdiction conferred on the board, and in the power to control the prosecution and defense of all suits to which the county is a party.

Accepting that as a correct rendition of the powers conferred on the board of supervisors in respect to the prosecution and defense of suits to which the county may be a party, the contract under consideration is not of that character. The plaintiff does not allege that his assignors were attorneys or counselors at law, or that they, or the board of supervisors, contracted for legal services to be rendered by them in connection with or independent of the district attorney. The subject-matter of the action was the collection of *choses in action* which belonged to the county. Without obtaining any order or instructions from the board to sue, the contracting parties agreed "to commence a proper suit, or proceeding, or negotiation, for the collection of the amount due upon said bonds, within sixty days from date, and to faithfully and diligently prosecute the same until a final judgment or settlement, without any cost or charge to the county; . . . and to accept in full for all services to be rendered by them, or attorneys *they may employ in the matter*, the sum of fifty per cent upon each and every dollar so collected by them of the amounts due upon said bonds," etc.

It may be conceded that the board of supervisors had power to contract for the collection of the property of the county; but in the exercise of that power it had no authority to delegate to others, whom it employed for that purpose, the power to determine whether to commence a suit in the name of the county, and to select and employ attorneys to commence and prosecute such a suit; nor to abdicate its control of the prosecution of such a suit, or to make its compromise or settlement dependent upon the written consent of strangers. The commencement of a lawsuit, the selection and employment of attorneys to commence and

prosecute it, and the compromise and settlement of the same are acts which involve the exercise of judgment and discretion; and it is well settled that powers conferred upon a municipal corporation to do such acts cannot be delegated to others. Such powers are in the nature of public trusts conferred upon the corporation for the public benefit, and cannot be vicariously exercised. (Cooley's Const. Lim. 204.) Hence the contract in suit was *ultra vires*; and the court below properly sustained the demurrer.

ROSS, J., and MCKINSTRY, J., concurred.

Hearing in Bank denied.

[No. 9136. Department One.—July 30, 1885.]

I. H. WALTON, RESPONDENT, v. JAMES KARNES,
APPELLANT.

AGREEMENT—REAL ESTATE—STATUTE OF FRAUDS.—An oral agreement under which the defendant advanced money for the plaintiff to pay certain instalments upon a contract for the purchase of land, the defendant being named in the contract as a purchaser, but really acting for the plaintiff in pursuance of the agreement, *held*, to be valid, and not within the Statute of Frauds.

APPEAL from a judgment of the Superior Court of the county of Fresno, and from an order refusing a new trial.

The action was brought to compel an assignment of the contract of sale mentioned in the opinion. Judgment was rendered for the plaintiff in the court below. The remaining facts are stated in the opinion of the court.

Campbell & Hinds, for Appellant.

Sayle & Harris, for Respondent.

MCKEE, J. — This case as presented by the record is this: By a verbal arrangement between plaintiff and defendant in the action, entered into pending a contest between the plaintiff and other persons, before the land agent of the Southern Pacific

Railroad Company, for the right to purchase from the company the southwest quarter of section 3, township 14 south, range 22 east, M. D. base and meridian, the defendant agreed, "if the contract of sale should be awarded plaintiff to advance for him the money necessary to make the first payment upon the land, and the plaintiff agreed to repay the defendant the moneys advanced by him for that purpose with interest at one and a half per cent per month from the date of the advances until paid, and to secure their payment by causing the contract of sale to be issued in the name of the defendant to be held by him until repayment when the contract was to be assigned to the plaintiff."

The right to purchase was awarded to the plaintiff, and on the 15th of December, 1881, defendant advanced for him the sum of \$492, as the first payment of the purchase money of the land. At plaintiff's request the contract of sale was made in the name of the defendant and delivered to him. Twelve months after the transaction of purchase another payment for interest in advance becoming due on the contract, defendant, at plaintiff's request, advanced it for the plaintiff upon the same terms as to interest and security. These advances and the interest thereon aggregated the sum of \$895. This sum the plaintiff on the 22d of January, 1883, tendered to the defendant, with a request for the assignment of the contract. The defendant refused to accept the money or to assign the contract, and he contends that he had the right to do so, because, as the verbal agreement between him and the plaintiff related to real property, it was void.

But it is not void; because as the contract of sale was taken by the defendant as security for repayment of the advances made by him for the plaintiff in purchasing the land, a resulting trust in the land was created to the extent of the advances. Section 853 of the Civil Code declares: "When a transfer of real property is made to one person, and the consideration thereof is paid by, *or for another*, a trust is presumed to result in favor of the person by, *or for whom* such payment was made."

Where a resulting trust exists the Statute of Frauds has no application. (*Millard v. Hathaway*, 27 Cal. 139.)

Judgment and order affirmed.

Ross, J., concurred.

McKINSTRY, J., concurring. — As I understand the transaction, the plaintiff paid the whole of the purchase money which was in fact paid. The money was loaned by the defendant to the plaintiff, and the former paid it to the railroad company as *agent* of the latter. The case is not affected by the circumstance that other payments may remain to be made on the contract. Certainly the defendant is in no better position than if he had actually made all the other payments himself. Although a verbal agreement by A to purchase land for B may not be given in evidence to establish a resulting trust where the entire purchase money had been paid by A and the conveyance taken in his name, yet if any part of the purchase money is shown to have been paid by B, a verbal agreement may then be proved which shall have the effect to deprive A of all beneficial interest in the purchase, and to clothe the entire estate in his hands with a trust in favor of B. (*Hidden v. Jordan*, 21 Cal. 92.)

[No. 20120. Department Two.—July 30, 1885.]

EX PARTE CHARLES L. DRESSLER ON HABEAS
CORPUS.

HABEAS CORPUS—WITNESS—UNREASONABLE DETENTION.—A person who has been detained as a witness for ninety days, and after several continuances of the case not satisfactorily accounted for, is entitled to his discharge on habeas corpus.

APPLICATION for a writ of habeas corpus. The facts are stated in the opinion of the court.

John D. Whaley, for Petitioner.

J. N. E. Wilson, *Contra*.

The COURT. — We are of opinion that the petitioner is entitled to his discharge under article i., section 6 of the Constitution, which provides that witnesses shall not be unreasonably detained. It appears that the witness has been detained as such for ninety days, and there have been several continuances in the case which are not satisfactorily accounted for.

The petitioner is discharged from custody.

LXVII. CAL.—17

[No. 9665. In Bank.—July 30, 1885.]

PIO PICO, APPELLANT, v. B. COHN ET AL.,
RESPONDENTS.

NEW TRIAL—ERRORS OF LAW—FAILURE TO SPECIFY.—Where the errors of law upon which a motion for new trial was made are not specified in the statement, it will be presumed that they were disregarded by the court on the hearing of the motion.

ID.—INSUFFICIENCY OF EVIDENCE—DISCRETION OF THE COURT.—A motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or decision is addressed to the sound legal discretion of the court, and an order granting a new trial will not be reversed on appeal unless it appears that there has been a manifest abuse of discretion.

APPEAL from an order of the Superior Court of the county of Los Angeles granting a new trial.

The facts are stated in the opinion of the court.

Glassell, Smith & Patton, Graves & Chapman, and A. D. Splivalo, for Appellant.

Brunson & Wells, and R. H. Chapman, for Respondents, cited O'Brien v. Brady, 23 Cal. 243, and other cases cited in the opinion.

THORNTON, J. — This is an appeal from an order granting the motion of defendants for a new trial. The notice of the motion for a new trial stated that it would be made on errors of law, and the insufficiency of the evidence to justify the decision.

As the errors of law were not specified as directed by the Code, we must presume that they were, in accordance with the statute (Code Civ. Proc. § 659, subd. 3), disregarded. The ground of insufficiency of evidence alone remains.

On the hearing of the above motion, the court, on the 24th of May, 1884, made an order granting it, unless the plaintiff within five days file his written consent to a modification of the decree herein, so that it shall require the payment by plaintiff to defendants within thirty days from the date of the order of the sum of \$138,000, with legal interest from such date, instead of the sum of \$103,000 as stated in the decree, and on the filing by the plaintiff within the time mentioned of his assent to such

modification, the new trial be denied and the judgment modified accordingly. The plaintiff refused his consent to this modification, and a new trial was ordered.

The order could only have been granted on the grounds on which it was asked by defendants. The defendants had nothing to say, and were not called on to say anything in regard to the modification set forth in the above order. The plaintiff having refused to give his consent, the motion of defendants then stood as if no such order had been made. We are thus driven to pass on the order for a new trial as having been made on the insufficiency of the evidence to justify the court's decision. If we were to reverse the order, the judgment for \$103,000 would stand unchanged, although the court had substantially admitted an error in the decree in requiring the plaintiff to consent to a change in it, requiring him to pay a much larger sum, as a condition to its refusing defendants' motion. This would seem to be, under the circumstances, clearly unjust.

The learned counsel for plaintiff is obviously mistaken in assuming that the defendants, in their specifications of the insufficiency of the evidence, have failed to make objection to so much of the findings as would justify the judgment rendered by the court below, or that their specifications only extended to the amount which the plaintiff should be adjudged to pay.

It will be observed that the case of plaintiff rests upon the allegation that defendant Cohn agreed to advance, and did advance certain sums of money to plaintiff, to secure the payment of which the deed executed by him to defendants, sought herein to be declared and adjudged a security, was given. This was denied by defendants, who set up that there was no advance made or agreed to be made by Cohn, but that the money paid to the plaintiff by defendants was a payment for the property in controversy, absolutely purchased of plaintiff by defendants, and that the deed was made on such purchase, and not at all as security for the payment of any sum whatever. Now one of the specifications of insufficiency goes to this issue. The defendants set forth in their specifications that the evidence is insufficient to sustain so much of finding four as finds that it was understood and agreed that said Cohn should advance the amount of said liens as estimated by him, but on the contrary,

the evidence shows that Cohn absolutely refused to advance any money for and on account of said Pico.

This matter of advance goes to the very foundation of plaintiff's case; for if there was no agreement for an advance, and no advance, the case of the plaintiff is at an end.

There are other matters specified of the same character, but for the purposes of the argument no others need be stated.

In *Peters v. Foss*, 16 Cal. 357, it was held that a motion for a new trial is addressed to the sound discretion of the court, and this court can interfere only in case of a plain abuse of discretion by the court below. This court affirmed the same rule in *Quinn v. Kenyon*, 22 Cal. 82, and in the opinion it is said: "It is only in rare instances and upon very strong grounds that this court will set aside an order granting a new trial." And it has been uniformly held by this court that a motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or decision is addressed to the sound legal discretion of the court below, and that on appeal from an order granting a new trial this court will not reverse the order unless it appears that there has been a manifest abuse of discretion. (*Hall v. Bark Emily*, 33 Cal. 522; *Phelps v. Union C. M. Co.* 39 Cal. 410; *Pierce v. Schaden*, 55 Cal. 406; *Bronner v. Wetzlar*, 55 Cal. 419; *Gerold v. The I. M. Brunswick Co.* 67 Cal. 124.) As we find no abuse of discretion in making the order herein appealed from, we should act in utter disregard of a well-settled rule of this court were we to disturb the order in this case.

Our judgment is that the order should be affirmed, and it is ordered accordingly.

MORRISON, C. J., ROSS, J., MYRICK, J., and MCKINSTRY, J., concurred.

Rehearing denied.

[No. 20086. Department Two.—July 31, 1885.]EX PARTE B. ERNST TITTEL ON HABEAS
CORPUS.

CONTEMPT—JUDGMENT DEBTOR—SATISFACTION OF JUDGMENT.—In a proceeding for contempt against a judgment debtor for failing to comply with the judgment, a satisfaction by the plaintiff and an assignee of the judgment on file and of record is a sufficient answer to the charge of contempt made by one not a party to the suit, but who claims under another assignment of the judgment, the alleged priority of which is disputed.

APPLICATION for a writ of habeas corpus. The petitioner was held in custody under an order of the Superior Court of the city and county of San Francisco committing him to jail for contempt in refusing to comply with a judgment of that court.

The remaining facts are stated in the opinion of the court.

Robert Ash, for Petitioner.

M. G. Cobb, *Contra*.

The COURT.—When this proceeding was commenced, satisfaction of the judgment had been filed by an assignee of the judgment, one Henry Huber, and entered of record. Before that time the assignee had filed his assignment from plaintiff with the clerk of the court, entitled in the case of *Lichtnock v. Tittel*, and with the papers in that case. This assignment authorized the assignee Huber to prosecute the suit above entitled, to collect the judgment and receipt therefor, and to enter satisfaction thereof in the name of the assignor or otherwise, as he shall deem proper. Subsequently, on the day the order on defendant to show cause why he should not be adjudged guilty of contempt in not obeying the judgment of the court was made, a satisfaction piece of the same judgment was signed, acknowledged, and filed by Huber and Lichtnock. So when the proceeding was commenced, and when the motion to punish for contempt was heard, the record showed that the judgment was satisfied and no longer existed.

This proceeding is prosecuted by one C. W. Cramer, who claims to be an assignee prior to Huber. Here when the motion to commit was heard was a satisfaction of the judgment by the

plaintiff in the action on file and of record. This is a sufficient answer to the charge of contempt by a person not a party to the suit, claiming under an alleged prior assignment, the priority of which is disputed.

The petitioner is entitled to his discharge; and it is so ordered.

[No. 9670. Department One.—August 1, 1885.]

W. T. SMITH ET AL., RESPONDENTS, v. THOMAS CUNNINGHAM, APPELLANT.

ATTACHMENT—CROPS GROWN BY ADVERSE POSSESSOR.—Crops grown upon land by a person in the actual, exclusive, and adverse possession thereof, cannot be attached as the property of the legal owner of the land.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order refusing a new trial.

The facts are stated in the opinion.

W. L. Dudley, for Appellant.

George E. McStay, and *Mich. Mullany*, for Respondents.

SEARLS, C. — This action was brought to recover a quantity of hay or its value.

Plaintiffs had judgment.

Defendant moved for a new trial, which was refused, and the cause comes up on appeal from the judgment and order denying the motion for a new trial.

In October, 1882, plaintiff Mary V. Smith entered upon the northwest quarter of section 17, township 3 north, range 9 east, M. D. M., in good faith as a pre-emption claimant, claiming the right to pre-empt the same under the laws of the United States, and has ever since occupied and cultivated and has been continuously in the actual and exclusive possession of said land in good faith as such pre-emption claimant, holding the same adversely to all other persons.

While thus in the actual, exclusive, and adverse possession of the land, she and her tenant W. F. Smith plowed the land, and

sowed it in wheat, which they cut and made into the hay which the defendant, as the sheriff of San Joaquin County, levied upon under a writ of attachment duly issued, etc., against the property of J. Wright Johnson.

At the date of the entry of Mary V. Smith upon the land in question, said J. Wright Johnson was and still is the holder of the legal title to said land.

J. Wright Johnson, though the legal owner of the land in question, could not have maintained an action to recover the hay. Plaintiffs were in the possession of such land, holding the same adversely to said Johnson; had cultivated, planted, raised, and harvested the crop while so holding adversely.

In such case it is settled an action of replevin will not lie. Such action cannot be made the vehicle for testing the title. (*Pennybecker v. McDougal*, 46 Cal. 661; *Martin v. Thompson*, 62 Cal. 618.)

Having no such title to the hay as would support an action for its recovery, it was not subject to seizure by the sheriff as Johnson's property, at the suit of his creditor.

This view of the case was taken by the court below, and rendered it unimportant to determine as to the validity of the writ of attachment under which the defendant as sheriff levied upon the property. If regular it could not justify him in taking plaintiff's property, and if irregular he was in no worse position.

The errors assigned upon the action of the court in the admission of testimony so far as supported by the record are without merit.

We find no error in the record and the judgment should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

[No. 9554. Department One.—August 1, 1885.]

W. L. SULLIVAN, APPELLANT, v. FREDERICK MIER
ET AL., RESPONDENTS.

STREET ASSESSMENT IN SACRAMENTO—FORECLOSURE UNDER ACT OF MARCH 16, 1864—PLAINTIFF—JUDGMENT.—The people of the State of California, and not the city of Sacramento, is the proper plaintiff in an action brought under the Act of March 16, 1864, to foreclose a street assessment in the city of Sacramento. If such an action be brought in the name of the city as plaintiff, the judgment therein is void, although rendered in favor of the people of the State as well as the city.

ID.—ACT OF MARCH 16, 1864, CONSTITUTIONAL.—The provision of the Act of March 16, 1864, requiring the action to be brought in the name of the people of the State of California, is constitutional.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

E. N. Martin, and *L. S. Taylor*, for Appellant.

Wallace & Hastings, for Respondents.

FOOTE, C.—In the trial court, the plaintiff W. L. Sullivan sued Fred Mier and Conrad Zwickel in an action of ejectment for a lot of land in the city of Sacramento.

The plaintiff introduced in evidence, as part of his chain of title, a judgment roll and a sheriff's deed.

The judgment roll disclosed the fact that the complaint was filed and summons issued on the 22d day of July, 1864; that the action was commenced on that day. The action was for a delinquent street assessment due the city of Sacramento. The law by virtue of which such actions could be brought is to be found on page 183 of the Legislative Acts of 1863–64, of date March 16, 1864, so that the action under discussion was of necessity governed in its proceedings by the Act of March 16, 1864, above referred to.

Upon examination it is discovered that the provisions of that law required in all cases that the complaint should name the people of the State of California as plaintiffs, and not the city of Sacramento. It will be found also that this act was in relation to suits of a special character, viz.: "For municipal or levee taxes or street assessments. (See § 2 of said act.)

The action for delinquent street assessment, by virtue of the proceedings in which, and the judgment had and made therein, the plaintiff in the action of ejectment now on appeal here claimed title to the premises involved in that action, was not brought in the name of the people of the State of California as plaintiffs, but was brought in the name of the city of Sacramento, as the complaint, a part of the judgment roll therein, unmistakably shows; nor does it appear anywhere upon the record that any other party was ever legally joined with the city of Sacramento as plaintiff. The cause then proceeded to judgment, and the judgment or decree of foreclosure and order of sale in the action was entered in favor of the people of the State of California and the city of Sacramento as plaintiffs. If the court which rendered this judgment or decree and order of sale had no jurisdiction to do so, then they were void.

The action was a special one in its nature, and this court said in *Richardson v. Tobin*, 45 Cal. 30, which was an action for a street assessment: "The counsel for the defendant also raises the point that it was not within the constitutional power of the legislature to prescribe the requirements of a complaint in this class of actions. But we apprehend the counsel does not seriously urge this point, after the admission in his reply brief that 'after the most thorough investigation of all the works on constitutional law, and of the latest digests, there can be found no law limiting the powers of the legislature to regulate the pleadings' in cases like the present."

The law which prescribed in what name such an action should be brought, and which prohibited a certain corporation, viz., the city of Sacramento from being named as plaintiff, was constitutional.

But the sixth District Court of the State of California, sitting in and for the county of Sacramento, rendered a judgment or decree and order of sale in the tax assessment suit in favor both of the city of Sacramento, which was alone a party plaintiff to the action, and also in favor of the people of the State of California, who never were in any way legally made parties to the suit.

If the judgment or decree and order of sale had been in favor of the city of Sacramento alone, following the complaint in the

action which named said city only as plaintiff, they would have been void, because the court could by law entertain such suit only when brought in the name of the people of the State of California; but it went further; it not only rendered a decree and made an order of sale in favor of the city of Sacramento when it had no jurisdiction of such an action, unless brought in such plaintiff's name as the Act of March 16, 1864, prescribed; it joined in said decree of foreclosure and order of sale the people of the State of California as plaintiffs, when such plaintiffs have never been made by any legal steps parties to that action, thus attempting to render a judgment against a defendant in favor of a plaintiff who had never instituted an action against him.

From this it follows that the decree of foreclosure and order of sale through which the plaintiff claimed title are utterly void, as is the deed of the sheriff thereunder.

"The purchaser at a sale on execution under a void judgment finds himself without title." (Freeman on Executions, § 20; *Emeric v. Alvarado*, 64 Cal. 590.)

The conveyances which the plaintiff introduced in evidence as mesne conveyances subsequent to the void sheriff's deed of course conveyed no title, being based upon that deed.

There are other errors alleged to have taken place on the trial below, but we need not notice them, since the plaintiff, by his own evidence, has shown his title to have no existence.

The judgment and order denying the motion for new trial in this case ought to be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in Bank denied.

[No. 9778. Department One.—August 1, 1885.]

HENRY JUNKANS, APPELLANT, v. JOHN BERGIN ET AL.,
RESPONDENTS.

WATER RIGHTS—APPROPRIATION.—A subsequent appropriator of water from a natural stream has no right to destroy the ditch of a prior appropriator, or to materially diminish the quantity or deteriorate the quality of the water to which the latter is entitled.

ID.—POINT OF DIVERSION MAY BE CHANGED.—One entitled to divert a quantity of water from a stream may take it at any point on the stream, and may change the joint of diversion at pleasure, if the rights of other appropriators be not injuriously affected by the change.

ID.—FINDING—EVIDENCE.—On a review of the evidence, *held*, that a finding of the court below as to the carrying capacity of the ditch of the plaintiff, and the amount of water to which he was entitled by appropriation, was justified, and that the defendants had diverted a portion of the water to which the plaintiff had a prior right.

APPEAL from a judgment of the Superior Court of Trinity County, and from an order refusing a new trial.

The facts are stated in the opinion.

J. W. Philbrook, and *Hatch & Chadbourne*, for Appellant.

W. J. Tinnin, and *John C. Burch*, for Respondents.

BELCHER, C. C.—This is an action to recover damages for the diversion of water, and for an injunction.

The case was tried by the court, and judgment rendered in favor of the defendants.

The plaintiff then moved for a new trial, which was denied, and the appeal is from the judgment and from the order denying the new trial.

It appears that the plaintiff owned two ditches in Trinity County, one known as the Perkins Bar Ditch, and the other as the Evans Bar Ditch, which took water from Perkins Creek and conducted it to Perkins Bar on the Trinity River, where it was used for mining. Perkins Creek had a tributary known as Maple Creek, and the defendants had two ditches, one known as the Hop Lee Ditch and the other as the Fronte Ditch, which took water from Perkins Creek and conducted it to a point on Maple Creek, where it was used by them in mining.

The Perkins Bar Ditch had the oldest water right, and took its water from Perkins Creek, about half a mile above the mouth

of Maple Creek. The Evans Bar Ditch had the next oldest water right, and up to 1882 took its water from Perkins Creek, just below the mouth of Maple Creek. In that year, the dam which turned the water into the ditch was so filled up with tailings, which the defendants, by their mining operations on Maple Creek caused to flow down that creek, that it became very difficult and expensive to maintain it so as to keep the water flowing into the ditch, and the plaintiff then moved his dam up Perkins Creek to a point about fifty feet above the mouth of Maple Creek.

The defendants' ditches were constructed after the plaintiff's ditches, and took water from Perkins Creek above the head of the Perkins Bar Ditch. The defendants and their grantors had been using their ditches to conduct water from Perkins Creek to their mines on Maple Creek since 1877, till they were stopped from so doing by the temporary injunction issued in this case.

1. The court found the capacity of the Perkins Bar Ditch to be $247\frac{1}{2}$ inches of water, delivered under a five-inch pressure, and that as appurtenant to that ditch the plaintiff had the first right to take that quantity of water from the creek.

The appellant claims that the quantity of water allowed for his, Perkins Bar Ditch, is too small, and that the finding limiting it to the quantity named is not supported by the evidence.

It is not easy to see just how the court found the exact figures named, but we think there was a substantial conflict of the evidence upon the subject. The complaint alleges the capacity of the ditch to be 300 inches under a four-inch pressure. The plaintiff testified that its capacity was from 300 to 400 inches, without naming the pressure. One of his witnesses, who was a civil engineer, testified that he measured it on the 28th of February, 1884, and that the capacity of the ditch when "as full as it could carry," was 360 inches under a four-inch pressure.

For the defense, the respondent Bergin testified that the ditch was enlarged in its capacity one third in the fall of 1882, and that he first learned its capacity in 1880, and would judge it to be from 150 to 160 inches. Another witness for the defense testified that the ditch was enlarged in 1882 so that it would probably carry 100 or 125 inches more than it would when he first knew it in 1881, and that when he first knew it, its capacity

was from 150 to 200 inches, though he never measured it exactly.

There is no denial on the part of the plaintiff that the ditch was enlarged in 1882, and looking at all the testimony upon the subject it would seem that the finding was quite as favorable to the plaintiff as he was entitled to have it.

2. The court found that in 1882 the Evans Bar Dam was destroyed by tailings sent down by the mining operations of the defendants, and the plaintiff in that year removed his dam, or rather constructed a dam in place thereof on Perkins Creek, about fifty feet above the mouth of Maple Creek, and diverted water therefrom into his Evans Bar Ditch; and as a conclusion of law, that the plaintiff by permitting the defendants to destroy his dam on Perkins Creek, below the mouth of Maple Creek, known as the Evans Bar Dam, and by erecting in place thereof a new dam on Perkins Creek, above the mouth of Maple Creek, lost his prior rights as against the defendants to the water of Perkins Creek, which he had acquired by the construction of the Evans Bar dam and ditch.

The appellant claims this finding and conclusion to be against law.

The appellant's ditch had capacity to carry 700 inches of water, delivered under a five-inch pressure. Up to 1882, its head dam being below the mouth of Maple Creek, it took the waters of both creeks. To the extent of its capacity the appellant, being the first appropriator, had the right to have all those waters flow into his ditch. But subject to that right the respondents might lawfully divert the water from Perkins Creek and use it on Maple Creek. (*Union Water Co. v. Crary*, 25 Cal. 504.) This they had been doing for several years, and it is not alleged that its quantity was diminished, or its quality deteriorated. They had no right, however, by their mining operations, to destroy or to fill up the appellant's dam or ditch, or to materially diminish the quantity or deteriorate the quality of the water, and if they did that, an action might have been maintained against them for damages and to restrain their works. (*Hill v. King*, 8 Cal. 336; *Hill v. Smith*, 27 Cal. 476.)

Instead of resorting to such an action the appellant moved his dam to a point above the mouth of Maple Creek where it

was impossible to divert the waters flowing down that creek into his ditch, and now seeks to restrain the respondents from diverting water from Perkins Creek, and damages for past diversions. Undoubtedly one entitled to divert a quantity of water from a stream may take the same at any point on the stream and may change the point of diversion at pleasure, if the rights of others be not injuriously affected by the change. (*Kidd v. Laird*, 15 Cal. 161.)

Here the rights of the respondents might be injuriously affected by the change if this action could be maintained. We think the appellant has mistaken his cause of action, and that the findings in this respect are not obnoxious to the objections urged.

3. The court found that "defendants have at all times respected the prior rights of plaintiff to the 247½ inches of the first flow of the waters of Perkins Creek, and have not, nor has either of them, at any time, deprived the plaintiff or his said ditch of any portion of said 247½ inches of water to which he had a prior right, nor have they or either of them in anywise interfered with or trespassed upon said plaintiff's prior right to said 247½ inches aforesaid, or any part thereof, nor threatened so to do." And it further found that "plaintiff has not been damaged by any acts of the defendants, or either of them, in the sum of \$1,000, nor in any other sum of money, or at all." The appellant claims that these findings are not supported by the evidence, while the respondents insist that there was a substantial conflict in the evidence upon the subject.

On looking at the evidence, we find that the appellant, speaking of his Perkins Bar Ditch, testified: "Since I bought it, water has been running in it steadily, except when turned out to clean the ditch, and several times when it has been taken from me, Bergin and Fronte, defendants, took it; they took it two years ago. It was turned back after I notified them not to take it; . . . did not allow me one quarter of what my ditch was entitled to. My ditch was left only about three inches in the flume. They kept the water during the mining season so long as they mined there, then they gave it up. This water was worth to me from two dollars to four dollars per sluice head per day. Again last fall they took the water from my ditch; it might have been partly in December. When there was plenty of water in the creek they would use most of it, and claim that I

was only entitled to forty-three inches. They retained the water that time until I sued out an injunction in this action. . . . A sluice head is thirty-six inches." And on cross-examination he testified: "When defendants were diverting water from the Perkins Bar Ditch, the amount they took was one half the quantity that ditch would carry. That ditch was not half full. I went and measured, and there was only two and one half inches in our flume." In answer to this, respondent Bergin testified: "In taking water in the Hop Lee and Fronte ditches I have not turned in any water, except when there was water flowing by the dam which diverts it into Perkins Bar Ditch."

This is all the testimony cited by respondents to show a conflict, and all, after a careful reading of the transcript, that we have been able to find. Does this show a substantial conflict? It must be noted that the witness does not say he always allowed water enough to flow by the head of his ditches to fill the plaintiff's ditch, nor does he name any quantity that he allowed to pass. His statement simply is that he never "turned in" any water when there was not water flowing by the plaintiff's dam. This might be literally true, even though after he had turned it in there was not water enough left in the stream to half fill the plaintiff's ditch.

It should also be noted that in their answer the defendants deny that the plaintiff's ditch has the capacity to carry, or the right to divert any greater quantity of water than 174 inches, delivered under a five-inch pressure, and that one of the defendants' witnesses, who had been their ditch-tender, testified that he "always allowed to Perkins Bar Ditch from 150 to 160 inches."

The appellant was entitled at all times to take from the stream $247\frac{1}{2}$ inches of water, delivered under a five-inch pressure, and it is clear from his testimony that the respondents did not always respect his rights, but diverted a portion of that water from him, and thereby did him damage. The testimony of respondents in answer to this was evasive, and did not, we think, create a substantial conflict.

For the reasons last stated the judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

[No. 9930. Department One.—August 1, 1885.]

T. M. BARHAM ET AL., APPELLANTS, v. F. M. HOSTETTER, RESPONDENT.

APPEAL—ORDER DISSOLVING INJUNCTION.—An appeal from an order dissolving an injunction must be taken within sixty days from the date of the entry of the order.

INJUNCTION—DIVERSION OF WATER—DAMAGES—JOINDER OF CAUSES OF ACTION.—The plaintiffs were owners in severalty of certain distinct parcels of land, and the action was brought to restrain the defendant from depriving them of water carried by various ditches to their respective lands, and to recover damages sustained by reason of past diversions of the water. *Held*, that the cause of action for damages was several as to each of the plaintiffs, and that it could not be joined with the cause of action for an injunction, which was common to all of them.

ID.—PLEADING—COMPLAINT.—The complaint examined, and *held* to be ambiguous, unintelligible, and uncertain.

APPEAL from a judgment of the Superior Court of Lassen County, and from an order dissolving an injunction.

The facts are stated in the opinion.

E. V. Spencer, for Appellants.

There was no misjoinder either of parties or of causes of action. (*Hillman v. Newington*, 57 Cal. 56; *Johnson v. Sepulveda*, 5 Cal. 149; *Parke v. Kilham*, 8 Cal. 77; 68 Am. Dec. 310; *Stein Canal Co. v. Kern Island Irrigation Co.* 53 Cal. 563; *Wilson v. Castro*, 31 Cal. 427.)

A. L. Shinn, and *C. G. Kelley*, for Respondent.

FOOTE, C. — This was an action brought by eleven plaintiffs to restrain an alleged diversion of the waters of a certain creek, by the defendant, and for damages for such alleged diversion.

The appeal is prosecuted from the judgment of the trial court in dismissing the action, and from an order dissolving a preliminary injunction.

The judgment roll discloses that a demurrer was interposed to the complaint, and that it was sustained, and the plaintiffs declining to amend upon leave given, the action was dismissed with costs against plaintiffs.

This judgment of dismissal was made on the 4th day of October, 1884, leave to amend for twenty days having been previously given on the 21st day of July, 1884.

The preliminary injunction was dissolved on the 3d day of June, 1884, and the appeal from the judgment and order was not taken until the 22d day of January, 1885.

The order dissolving the injunction cannot be reviewed here, as the plaintiffs did not take an appeal from that order until far more than sixty days had elapsed. (Code Civ. Proc. § 956; *McCourtney v. Fortune*, 42 Cal. 387.)

The only questions then left for discussion are those underlying the judgment of dismissal of the action.

Unless the demurrer to the complaint ought to have been overruled, this judgment was undoubtedly right, for the plaintiffs did not avail themselves of the ample opportunity to amend their complaint granted them by the court on sustaining the demurrer.

The grounds on which the demurrer was sustained are as follows:—

1. That there was a misjoinder of causes of action.

2. That the complaint was ambiguous, unintelligible, and uncertain, for the reason that the real estate and ditches of the plaintiffs were not described with sufficient certainty, and that it did not appear which of two plaintiffs named Barham were interested in ditches Nos. 10, 11, and 12, as set out in the complaint.

The purpose for which the action was instituted, as appears from the body and prayer of the complaint, was to restrain the defendant from depriving the several plaintiffs of water for irrigation purposes, carried by various ditches to certain distinct parcels of land owned not jointly, but separately, by different plaintiffs, and to recover \$500 damages alleged to have been done to the plaintiffs in the aggregate.

One plaintiff was alleged to be the sole owner of 60 acres of land affected by the deprivation of water caused by the defend-

ant's acts. Two plaintiffs alleged to be joint owners of 40 acres, one plaintiff to be the sole owner of 60 acres, another sole owner of 60 acres, another of 100 acres, another of 20 acres, one of 40 acres, two as joint owners of 40 acres, and another as sole owner of 100 acres.

The damages claimed in an aggregate sum for all the plaintiffs jointly was \$500.

The cause of action for damages is not joint as to all the plaintiffs, but undoubtedly several; it is joined with a cause of action for an injunction which is common to all the plaintiffs; hence the demurrer upon this point was properly sustained.

"There is no more a common interest than though a carrier had at one time carelessly destroyed property belonging to different persons." (Bliss on Code Pleading, p. 76.)

The plaintiffs set out in the complaint the number of acres of land they each own; that these lands join each other and constitute one body of land, and that said land is situated on Baxter Creek, and in Lassen County, Cal.

From this description an ordinary inquirer after these lands would be likely to travel up and down Baxter Creek for many days, and still be left in the most painful uncertainty as to their exact location; and when it comes to the description of the ditches as set out in the complaint, it is hard to believe that even a professional surveyor could ever successfully locate them.

In the complaint there are mentioned as plaintiffs, Messrs. T. M. Barham and Charles Barham, and a man named Barham is declared to be a joint owner of ditch No. 10, with other plaintiffs, not named Barham, and ditches 11 and 12 are declared to be owned by plaintiffs Dunn and Barham jointly; but as there are two Barhams named as plaintiffs, and the pleader did not deem proper to state which of the two, whether T. M. or Charles Barham had any interest in those ditches, it is not surprising that as to that matter both the court below and the defendant were left in ignorance.

We are of opinion that the court was entirely justified in sustaining the demurrer to the complaint and in dismissing the action.

For these reasons we think the judgment and the order dissolving the preliminary injunction ought to be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9617. Department One.—August 1, 1885.]

THOMAS ORR, APPELLANT, v. H. T. STEWART,
RESPONDENT.

ACTION TO QUIET TITLE—LEGAL TITLE IN GOVERNMENT.—An action to quiet title to lands is maintainable in this State, although the legal title thereto is in the government of the United States.

MORTGAGE IN FEE—AFTER-ACQUIRED TITLE—FORECLOSURE.—Where a mortgage of land purports to convey the fee, any title afterwards acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee; and this is so although the title when the mortgage was made was in the government of the United States, and was acquired by the mortgagor after a foreclosure of the mortgage.

ID.—MORTGAGE OF HOMESTEAD.—Section 2296 of the United States Revised Statutes does not prohibit the voluntary mortgaging of land entered as a homestead.

APPEAL from a judgment of the Superior Court of Siskiyou County.

The facts are stated in the opinion.

Nichols & Abels, for Appellant.

J. S. Beard, John V. Brown, and A. M. Rosborough, for Respondent.

BELCHER, C. C.—In January, 1870, the defendant Stewart made a homestead entry in the proper United States land office upon 160 acres of public land in Siskiyou County, under the provisions of the Homestead Act of 1862. In December, 1875, he mortgaged the land with its appurtenances, to the plaintiff Orr, to secure the payment of his promissory note for \$2,000. The mortgage was made in the form given in section 2948 of the Civil Code. In December, 1880, Orr commenced an action to

foreclose his mortgage, and on the 7th of February following, after a trial, obtained judgment for \$4,106, and decree of foreclosure and sale. Under this decree the mortgaged property was sold by the sheriff on the 5th day of March, 1881, and bid in by Orr, and on the 10th day of September, 1881, he received the sheriff's deed. Possession of the property was surrendered to him on the same day he received his deed. A few days later Orr conveyed the premises to one Cunningham, and on the 5th of November, 1883, Cunningham and wife reconveyed to Orr. In October, 1883, Stewart went to the United States land office and was there permitted to commute his homestead entry into a cash entry, and he accordingly then paid the government price for the land in full, and received a duplicate receipt and certificate of purchase therefor. From the time he obtained possession under his sheriff's deed, Orr and his grantor remained in possession of the land up to the time when this action was tried.

This action was commenced by Orr to quiet his title to the said land and to certain water ditches, and water rights, alleged to be appurtenant thereto. The defendant answered, denying that the plaintiff owned, or was entitled to the possession of the land or its appurtenances, and setting up his proceedings in the land office to acquire the title.

The case was tried by the court and the facts found to be substantially as above stated, but judgment was entered in favor of the defendant upon the grounds as shown by the conclusions of law:—

“1. That the legal title to the land in controversy in this action, and to quiet which plaintiff has brought this action, is in the government of the United States.

“2. The fact that plaintiff is in possession under the decree of foreclosure and proceedings thereunder had, or that he obtained such title as defendant had at the time the mortgage was given, and decree made and entered in the former suit between these parties, does not entitle him to judgment in this action for said land, or ditches, or appurtenances.

“3. That this court cannot by its judgment and decree restrain the defendant from proceeding to acquire title under his homestead entry from the government of the United States.

"4. That to entitle the plaintiff to recover said land, he must possess a title superior to that of the defendant, and of course superior to that of the United States, or he must possess equities which will control the title in the defendant's name, and which he cannot do in this action, defendant not having acquired title from the government of the United States."

The plaintiff appealed from the judgment, and the case comes here on the judgment roll.

The appellant contends that these conclusions of law are not the correct conclusions to be drawn from the facts, and that the judgment is, therefore, not supported by the findings. It is settled law in this State that an action to quiet title to a parcel of land may be maintained, notwithstanding the title to the land is still in the government of the United States. (*Brandt v. Wheaton*, 52 Cal. 430; *Wilson v. Madison*, 55 Cal. 5.)

It is also well settled that when a mortgage of land is made, purporting to convey the land in fee, any title afterwards acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee (*Clark v. Baker*, 14 Cal. 612; 76 Am. Dec. 449; *Kirkaldie v. Larrabee*, 31 Cal. 455; *Sherman v. McCarthy*, 57 Cal. 507); and this is so though the title when the mortgage was made was in the government and was afterwards acquired by patent from the government. (*Christy v. Dana*, 42 Cal. 174; *Camp v. Grider*, 62 Cal. 20.) The reason for the rule is said in *Clark v. Baker*, *supra*, p. 633, to be that the relation of the mortgagor is "one which requires him to preserve the property for the purpose of the security for which it was originally pledged; and hence to insure good faith and fair dealing, he is forever precluded from denying the existence of the lien which he has attempted to create, or defeating its enforcement against the property upon which it was placed."

Counsel for respondent do not question the rule as above stated, but they insist that it applies only when the outstanding title is acquired by the mortgagor before foreclosure of the mortgage, and that any title acquired by him after foreclosure and sale is not affected by it. In this counsel are mistaken. In *Vallejo Land Association v. Viera*, 48 Cal. 572, the same objection was raised, but the ruling was against the views of respondent here. That case was ejectionment, and the plaintiff's title to

the land involved originated in a sheriff's deed given after a foreclosure and sale of mortgaged property. At the time of the foreclosure the title was in the government, but it was afterward acquired by the defendant, who had been the mortgagor. The court said: "The rule that a sheriff's deed delivered upon execution sale imparts no warranty of title, but transfers to the purchaser only such estate as was held at the time by the defendant in execution has no practical application to a sheriff's deed delivered upon foreclosure of a mortgage in fee; for, as we have seen already, the defendant in the latter case must continue to be estopped by the terms of the mortgage deed itself, to deny that the estate was other or less than an estate in fee in the premises. These terms, importing a conveyance of the fee, are equivalent to a covenant of general warranty of title running with the land. We are therefore of opinion that the plaintiff is vested with the legal title to the premises in controversy."

But if this be so, counsel still insist that the plaintiff cannot maintain this action for the reason that his mortgage was taken in violation of section 2296 of the Revised Statutes of the United States, concerning homesteads, and was therefore void, and of no effect.

That section reads as follows: "No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The same section was invoked in *Kirkaldie v. Larrabee*, 31 Cal. 455, to defeat the mortgage then sought to be foreclosed, but it was held not to apply to voluntary conveyances or mortgages in fee. The court said: "There is nothing in the Homestead Act of 1862 forbidding a voluntary alienation by the grantee under that act. The same principle applies to a mortgage of the fee. (*Clark v. Baker*, 14 Cal. 630.) The title will pass not merely in consequence of the enforcement of the payment of a debt by the ordinary process of the courts, but in consequence of the voluntary contract of the party in executing the mortgage. The mortgagor of the fee is estopped from denying the existence of the lien which he has attempted to create, and from defeating, by his own act, the enforcement of the lien against the property thus mortgaged."

When the plaintiff's mortgage was executed, the Code (Civ. Code, § 2930) provided that "title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt, in like manner as if acquired before the execution." It was a voluntary mortgage in fee, and was not made void or voidable by any provision of the homestead act. It follows that the plaintiff had the right to maintain his action and to have his title to the land in controversy quieted, as against any title which the defendant has acquired or may acquire from the government or otherwise, and that the court erred in rendering judgment for the defendant.

The judgment should be reversed and the cause remanded.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded.

[No. 9943. Department One.—August 12, 1885.]

ELIZA C. MELONE, RESPONDENT, v. FRANKLIN DAVIS,
APPELLANT.

ESTATE OF DECEDENT—ACTION TO RECOVER DISTRIBUTIVE SHARE—DEFENDANT INDIVIDUALLY LIABLE.—An action to recover the amount distributed to the plaintiff by the decree of distribution in the estate of a decedent should be brought against the defendant individually, and not in his representative capacity.

ID.—DEMAND NEED NOT BE ALLEGED.—In such an action the complaint need not allege a demand on the defendant as executor or administrator. The action itself is a sufficient demand.

ID.—INTEREST—TAXES.—An administrator who neglects to pay over to a distributee the amount awarded him by the decree of distribution, is liable for legal interest thereon from the time payment was ordered, and is not entitled to reimbursement for taxes subsequently paid by him on the distributive share.

APPEAL from a judgment of the Superior Court of San Joaquin County.

The defendant in his answer set up a counter-claim for the amount of taxes paid by him on the distributive share of the plaintiff, after the decree of distribution was entered. The counter-claim was disallowed by the trial court, and a personal

judgment was entered against the defendant for the amount awarded to the plaintiff by the decree of distribution, with legal interest thereon from the time it should have been paid. The further facts are stated in the opinion.

J. H. & J. E. Budd, for Appellant.

A demand on the defendant as administrator was necessary before the action could be maintained. (*Jones v. Tanner*, 7 Barn. & C. 544; *Holland v. Clark*, 1 Younge & C. Ch. 167; *Schroeder v. Jahns*, 27 Cal. 274.)

August Muentner, for Respondent.

It was the duty of the defendant to pay the amount distributed to the plaintiff within the time limited by the decree. Where it is the duty to pay no actual demand is necessary. (*Halleck v. Moss*, 22 Cal. 266; *Cummings v. Howard*, 63 Cal. 504; *O'Connor v. Dingley*, 26 Cal. 19; *Stacy v. Graham*, 14 N. Y. 492; *School District v. Zink*, 25 Wis. 636; *Smith v. Emery*, 7 Halst. 53; *Watson v. Walker*, 23 N. H. 471; *Brent v. Maryland*, 18 Wall. 430.) The defendant was liable for interest. (Civ. Code, § 3287; *Mix v. Miller*, 57 Cal. 357; *Cummings v. Howard*, 63 Cal. 504; *Stacy v. Graham*, 14 N. Y. 492; *Kent v. Dunham*, 106 Mass. 586; *Jumel v. Jumel*, 7 Paige, 591; *Henry v. State*, 9 Mo. 778; *People v. Co. of N. Y.* 5 Cowen, 331; *Swett v. Hooper*, 62 Me. 54; *Page v. Fowler*, 39 Cal. 421; *Freeborn v. Norcross*, 49 Cal. 313; *Kelley v. McKibben*, 54 Cal. 192; *Davis v. Greely*, 1 Cal. 422.)

SEARLS, C. — Defendant was administrator of the estate of one Joseph M. Davis, deceased.

His final account as such was rendered, settled, and a decree of distribution made by the court.

This action is brought to recover the amount or sum distributed to plaintiff by that decree, and which was by the terms of the decree ordered to be paid by the administrator within ten days from September 20, 1881.

The cause was tried by the court, who filed findings in writing, and rendered judgment thereon in favor of plaintiff.

Defendant appeals from the judgment and the case comes up on the judgment roll.

Two points are urged by appellant. *First*, that the findings fail to show that a demand for payment was made upon defendant before suit was brought.

Second, that no action can be maintained against defendant as an individual until demand on him as an administrator, and refusal to pay.

One who receives money standing in the position of a trustee is in general not liable in an action for money received until demand is made or some breach of trust or duty committed. (*Walrath v. Thompson*, 6 Hill, 540.)

In the present case the money was received as administrator, and when the decree of distribution was made by the court requiring defendant within ten days to pay plaintiff the sum of money awarded her, and to make to her the assignments provided to be made to her, it became and was the plain duty of defendant to comply with the terms of the decree, and having for nearly three years failed so to do, he was guilty of a breach of duty, and no demand was necessary before suit brought.

The decree of distribution had in most respects all the efficacy of a judgment at law, or a decree in equity.

It could have been enforced by proceedings for contempt. (*Wheeler v. Bolton*, 54 Cal. 302.)

An action could be maintained upon it for non-compliance with its requirements, and we see no greater necessity for a demand than exists in case of suit upon an ordinary judgment at law, or before issuing execution upon a judgment.

Defendant was liable in contempt for not making payment under the decree, and as to him, suit brought was a sufficient demand. (*Cummings v. Howard*, 63 Cal. 503.) *Second*, the action was properly brought against defendant individually.

In actions against administrators and executors, founded upon promises made by the testator or intestate during his life, the defendant must be sued in his representative character; he may plead *plene administravit*, and the judgment will be not against him personally, but *de bonis testatoris*.

Not so, however, when an administrator or executor is sued upon his own promise or obligation, made or incurred after the

death of the testator or intestate. It is not necessary to name the defendant as executor or administrator, though it has been held it may be done by way of description, but he may be proceeded against individually, and a judgment *de bonis propriis* had. (*Waldsmith v. Waldsmith*, 2 Ohio, 156.) No action can be maintained against an administrator *as such*, that is founded upon malfeasance or misfeasance, or for a tort. (*Eustace v. Jahns*, 38 Cal. 3.)

A claim against the estate must be presented to the administrator for allowance, before suit brought.

This was not a claim *against* the estate, but a demand for a part of the estate.

Defendant had been the administrator; as such he had taken all the steps necessary to a distribution of the fund in hand. The court had made its decree requiring him to distribute to plaintiff the property and money sought in this suit. By refusing to comply with the decree he became personally liable to plaintiff as in case of *devastavit*.

The hardship of paying taxes on the property since 1881, complained of by counsel for appellant, is not entitled to consideration in view of the fact that had appellant performed his duty, by distributing the property as ordered by the court, the taxes thereon would not have devolved upon him to pay.

Like considerations are applicable to the complaint against the interest awarded by the court below.

We are of opinion the judgment of the court below should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

THE COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

[No. 9909. Department One.—August 12, 1885.]

H. C. BELL, RESPONDENT, v. SAMUEL McCLELLAN,
APPELLANT.

SALE—ACTUAL AND CONTINUED CHANGE OF POSSESSION—EVIDENCE.—

Upon a review of the evidence, *held*, that the sale under which the plaintiff claimed title to the personal property in question was void as to the creditors of his vendor, because unaccompanied by an actual and continued change of possession.

APPEAL from a judgment of the Superior Court of Butte County, and from an order refusing a new trial.

The facts are stated in the opinion.

A. F. Jones, T. L. Ford, and T. B. Reardan & Son, for Appellant.

Gray & Sexton, for Respondent.

BELCHER, C. C. — This is an action to recover the possession or value of two hay-presses.

It appears that the presses were the property of one Duncan, and were stored on the farm of McNulty, his brother-in-law. On the 19th day of January, 1884, Duncan sold the presses to the plaintiff in satisfaction of an indebtedness then due from him to the plaintiff.

The plaintiff received a bill of sale of the presses, and immediately wrote to McNulty, stating that he had bought them from Duncan, and asking McNulty to hold them for him. Duncan gave McNulty no notice of the sale. The presses remained stored in McNulty's shed till the 2d day of June, 1884, when the plaintiff again wrote to McNulty telling him to let Duncan take them and use them. Under this permission Duncan took the presses, had them repaired at a blacksmith's shop, and used them to bale hay on his own account until the 29th day of August following. He hired the men, paid them, contracted with parties for baling and received pay therefor. McNulty was one of the men employed by him and had charge of one of the presses. On the 29th of August, Duncan and McNulty went to the plaintiff's store at Oroville, and Duncan then told the plaintiff that he was sick and didn't want the presses any longer, and the plaintiff told McNulty to take them and continue to bale hay with them for him. McNulty took the presses and

continued baling hay with them for the plaintiff till the 4th of September. On that day they were taken from him by the defendant, acting as sheriff, under a writ of attachment issued out of the Superior Court in an action commenced by one Davidson against Duncan. Plaintiff never saw the presses and never took or held possession of them except as above shown.

Davidson never heard of the sale of the presses until the 29th of August, when Duncan told him he had sold them to the plaintiff in January.

Upon these facts the court below found "that the sale of said presses by C. M. Duncan to plaintiff was made in good faith, accompanied by an immediate delivery, and followed by an actual and continued change of possession, and that plaintiff was at the commencement of this action the legal owner of, and entitled to the possession of the same."

The appeal is by the defendant from the judgment and order denying his motion for new trial.

Conceding that the sale was made in good faith and was accompanied by an immediate delivery, notwithstanding no notice of the sale was given by Duncan to McNulty, still the appellant insists that it was not followed by an actual and continued change of possession as required by section 3440 of the Civil Code. In *Stevens v. Irwin*, 15 Cal. 506, it is said: "The delivery must be made of the property; the vendee must take the *actual* possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous, not taken to be surrendered back again, not formal, but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement to the status of the property and the claim to it by the vendee."

In *Cahoon v. Marshall*, 25 Cal. 201, it is said: "What constitutes an actual change of the possession of personal property, as distinguished from that which by mere intendment of law follows the transfer of title, is not of difficult solution. It is an

open, visible change, manifested by such outward signs as render it evident that the possession of the vendor has wholly ceased." (See also *Godchaux v. Mulford*, 26 Cal. 316, and *Hesthal v. Myles*, 53 Cal. 623.) In *Stevens v. Irwin* the vendee took immediate possession of the property, and held the open, visible, and notorious possession thereof for more than a year, and it was held that the length of time was sufficient to give general advertisement to the world of the status of the property. Here there was no open, visible change of possession, and the constructive possession which the plaintiff took lasted only from January to June. This was a time when there was little or no occasion to use hay-presses; but when the haying season returned, and there was hay to be baled, the presses were again found in the open, visible possession of the vendor, and they so remained, and were used by him on his own account for nearly three months.

We are unable to see how this can be held to be the actual and continued change of possession which the law requires to make the sale valid as against creditors.

It is suggested by counsel for respondent that the question whether the possession is actual and continued as against a creditor is one which must ordinarily be determined by the jury, and that when the testimony is conflicting upon the subject, the judgment should not be reversed. The answer is that the testimony here is not at all conflicting, and that upon the facts as stated it is simply a question of law whether they show an actual and continued change of possession or not.

We think the judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

[No. 9776. Department One.—August 12, 1885.]

S. W. CLARY, APPELLANT, v. J. H. HAZLITT ET AL.,
RESPONDENTS.

UNITED STATES PATENT—UNAUTHORIZED RESERVATION IS VOID.—An unauthorized reservation or condition in a United States patent to land is void.

ID.—PATENT TO PLACER CLAIM—RESERVATION OF QUARTZ LODE.—Section 2333 of the United States Revised Statutes authorizes the reservation in a patent to a placer mining claim, of any vein or lode of quartz, or other rock in place bearing gold, silver, lead, tin, copper, or other valuable deposits, claimed or known to exist within the boundaries of the placer claim at the date of the patent; and the patentee acquires no title or right of possession to such vein.

FINDINGS—SUFFICIENCY OF.—Findings of fact need not follow the language of the pleadings. If the truth or falsity of each material allegation not admitted can be deduced from the findings, the requirements of the Code are complied with.

APPEAL from a judgment of the Superior Court of Siskiyou County.

The facts are stated in the opinion.

W. McConaughy, and Freeman, Johnson & Bates, for Appellant.

An unauthorized reservation or condition inserted in a United States patent is void. (*Stark v. Starr*, 6 Wall. 402; *Wolfley v. Lebanon Min. Co.* 4 Colo. 115.) The reservation in question was not authorized by law. (U. S. Rev. Stats. § 2333.) It is only the right of possession that is concluded by a failure to include in the application for a placer claim a statement that the land applied for contains a quartz vein. But the right of possession must be determined by the land department before it can grant any patent, and becomes *res adjudicata* upon the issuance of the patent. When once determined by the land officers, the right of possession cannot be assailed in an action at law. (*Boggs v. Merced Min. Co.* 14 Cal. 363; *Upham v. Hosking*, 62 Cal. 259; *Sacramento Valley Rec. Co. v. Cook*, 61 Cal. 346; *Smelting Co. v. Kemp*, 104 U. S. 636; *Moore v. Robbins*, 96 U. S. 535; *Steel St. Louis Smelting Co.* 106 U. S. 447; *Bilk v. Meagher*, 104 U. S. 279.)

H. B. Gillis, H. B. Warren, and Hart & White, for Respondents.

Plaintiff did not acquire title to the quartz lode situated within the boundaries of his placer claim, and excepted from the opera-

tion of his patent. (U. S. Rev. Stats. § 233; *McLaughlin v. Powell*, 50 Cal. 64; *Gold Hill Quartz Min. Co. v. Ish*, 5 Or. 104.)

SEARLS, C. — Action to recover damages for trespass upon mining claims, and for injunction against defendants to restrain them from similar trespasses.

Plaintiff bases his action upon a patent issued to him for the *locus in quo*, as a placer mining claim under the provisions of chapter vi. of title 22 of the Revised Statutes of the United States.

Plaintiff's claim is known as the Ellis Placer Mining Claim, and within the exterior limits thereof there is a regularly defined lode of gold-bearing quartz rock in place, which was known to exist at the time of plaintiff's application for patent; and his application did not include an application for the lode.

The patent to plaintiff contained the usual reservation in such cases, viz.: "That should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above-described premises at the date hereof, the same is expressly excepted and excluded from these presents."

The land upon which the alleged trespasses were committed consisted of this quartz lode, which was located by the grantor of defendants in 1879 under the name of the California Queen Mine, and work by said defendants upon the quartz lode as situated and located constitutes the supposed trespasses complained of.

Defendants had judgment and plaintiff prosecutes this appeal.

The question in the case upon which the decision must turn is, whether by his patent to the Ellis Placer Mining Claim the plaintiff acquired title to said quartz lode or vein?

Section 2333 of the Revised Statutes of the United States provides as follows: "Where a vein or lode such as is described in section 2320 is known to exist within the boundaries of a placer claim, an application for a patent of such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

The preceding portion of the same section provides that the applicant for a patent being in possession of a placer claim and also of a vein or lode claim, included within the boundaries thereof, may upon application therefor and upon paying five dollars per acre for the lode claim therein, obtain patent for the whole.

Appellant contends that the condition in the patent "that should any vein or lode of quartz or other rock in place bearing gold . . . be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these presents," is void.

It must be conceded that where a patent contains a reservation or condition not authorized by law, such reservation or condition is a nullity. (*Stark v. Starr*, 6 Wall. 402; *Wolfley v. Lebanon Mining Co.* 4 Colo. 115.)

The land department is but an instrument by which the objects of the law are attained its jurisdiction and mode of procedure are defined by law, and its results must be such as are warranted by the paramount authority under which it acts.

Assuming this hypothesis as correct, it becomes necessary to inquire whether the clause quoted from section 2333 authorizes the reservation in the patent to plaintiff. Upon this question we do not entertain a serious doubt.

The language of section 2333 in cases of known lode claims in placer mines, applied to be patented, and which lode claims are not sought to be patented is explicit, and such omission "shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim."

If he has no right of possession it must follow that he has no right to a patent.

Congress has provided the manner in which a right to possession of mining claims may be acquired, and has further provided for the issuance of patents to those who have acquired such right of possession; has provided that in case of adverse claims, he who substantiates his right to possession shall thereupon be entitled to a patent.

And when the language in question is considered in connection with the context, and with the other provisions of the mining

law, the conclusion is reached that by the waiver of his right to possession, a waiver of his right to a patent is implied. The latter is a sequence of the former and cannot exist without it.

By this construction the harmony of the whole section is maintained, while the interpretation claimed by counsel for appellant would permit an applicant for patent to acquire title to a quartz claim at \$2.50 per acre, instead of \$5 as provided by law, and would render the latter clause of the same section under which unknown quartz lodes pass to the patentees of placer mines unnecessary.

We conclude the exception and exclusion of the quartz lode in question as specified in the patent was authorized by law, and that no title thereto vested in the appellant under his patent.

There is substantially a finding by the court below upon all the issues made by the pleadings in the case.

It is not necessary that the facts as found should follow the language of the pleadings which they support. If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the Code are met.

The judgment should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is affirmed.

Hearing in Bank denied.

[No. 9639. Department One.—August 12, 1885.]

C. A. LUHRS, ASSIGNEE OF S. J. DIERSSEN, AN INSOLVENT, RESPONDENT, v. EDWARD KELLY, APPELLANT.

INVOLUNTARY INSOLVENCY—JURISDICTION OVER PROCEEDING, HOW ACQUIRED—COLLATERAL ATTACK.—The court obtains jurisdiction over a proceeding in involuntary insolvency, upon the filing of the petition properly signed and verified, and the service of a copy thereof, together with a copy of the order to show cause, on the debtor. For errors afterwards committed, its proceedings cannot be collaterally assailed.

ID.—BOND OF ASSIGNEE—INSUFFICIENCY IN AMOUNT OF.—The assignment in such a proceeding is not collaterally assailable by reason of the fact that the bond filed by the assignee and approved by the court was for a less amount than that required by the order appointing the assignee.

LXVII. CAL.—19

EVIDENCE—IMPEACHMENT OF WITNESS—ATTEMPT AT BRIBERY.—Where a witness has testified to matters material to the issues, the party against whom he has testified may on cross-examination show that the witness is hostile to or prejudiced against him, and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses; but this can only be done when the witness has testified to material matters.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

Grove L. Johnson, for Appellant.

Freeman & Bates, for Respondent.

BELCHER, C. C.—This is an action commenced by the plaintiff, as assignee of one S. J. Dierson, an insolvent debtor, to recover the value of four barrels of whiskey and certain other personal property alleged to have been transferred by the insolvent to the defendant in violation of the provisions of section 55 of the Insolvent Act of 1880. The insolvency proceedings were involuntary, and every step taken in them was alleged in the complaint and denied in the answer.

When the case came on for trial, the plaintiff offered in evidence the petition in insolvency, the bond accompanying the petition, the order to show cause with the return of service thereof on the respondent, the order adjudging the respondent to be an insolvent debtor, and requiring him to file a schedule and inventory of his property, with the return of service thereof, the order appointing the plaintiff assignee, the bond of the assignee and a certified copy of the assignment made by the clerk of the court to the plaintiff as assignee. The defendant objected to the evidence upon the ground that it was irrelevant and immaterial, and that the proceeding did not conform to the requirements of the insolvent law. The court overruled the objections and admitted the evidence. We see no error in the rulings.

The petition was properly signed, verified, and filed. A copy of the petition and a copy of the order to show cause were regularly served on the debtor in the manner provided by law for the service of summons in civil actions. This gave the court

jurisdiction of the case (*Ohleyer v. Bunce*, 65 Cal. 544), and for errors afterward committed, its proceedings could not be assailed collaterally. The order to show cause required the debtor to appear on the 28th day of December. He did not appear, and the order adjudging him an insolvent was entered on the 3d day of January. There was nothing in this delay of which the defendant could take advantage.

As appears by the record the order appointing the plaintiff assignee required him to give a bond in the sum of \$2,000. On the next day he gave a bond in the sum of \$500, and it was approved by the judge and filed. In the assignment made by the clerk it is recited that the assignee had "filed a bond in the sum of \$500 as ordered by the court." There was here evidently some mistake, but it was one which did not concern the defendant. The creditors and debtor were alone interested in the amount and sufficiency of the bond, and they acquiesced in the bond given. The court had jurisdiction, and its approval of the bond was sufficient to justify and make valid the assignment as against a mere collateral attack.

In the progress of the trial plaintiff was called as a witness in his own behalf, and testified that he "was acquainted with the value of groceries; that whiskey on the 25th day of November, 1882, and now, was worth at least \$1.25 per gallon; that Miller whiskey was worth \$2.25 per gallon; that a barrel contained from forty to forty-five gallons; that he had known S. J. Dierssen for a good many years; that Dierssen was a retail grocer on and prior to November 25, 1882, and carried a stock in trade amounting to from \$1,200 to \$1,500 in value."

On his cross-examination the witness testified that he had a conversation with one George Dierssen, a brother of S. J. Dierssen, at a certain time and place, and was then asked: "In the course of that conversation did you tell him that you would let up on Louis Dierssen if he would testify against Kelly in this case; that you would let up on him and not prosecute him?" The question was objected to by counsel for plaintiff upon the ground that it was irrelevant, and the objection was sustained. The defendant then made an "offer to show that this witness openly attempted to bribe witnesses by promises of immunity."

This offer was also objected to as irrelevant and excluded, and to these rulings the defendant excepted.

Undoubtedly when a witness has testified to matters material to the issues, the party against whom he has testified may, in the cross-examination, show that the witness is hostile to or prejudiced against him (*People v. Wasson*, 65 Cal. 538; *Greenleaf on Ev.* § 450), and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses. But this can only be done when the witness has testified to material matters. Were the matters testified to by the witness in this case material? The testimony above quoted is all the testimony in the case which is found in the record. There was no issue as to the fact that Dierssen was a retail grocer and carried a stock in trade amounting to from \$1,200 to \$1,500 in value.

In the complaint it is alleged that Dierssen transferred to the defendant four barrels of whiskey of the value of \$500, and in the answer it is admitted that he transferred four barrels of whiskey of the value of \$300. Nothing appears in the pleadings or elsewhere as to the kind or quality of the whiskey. It would seem, therefore, that when the witness testified that whiskey was worth \$1.25 per gallon, and a barrel contained from forty to forty-five gallons, he was testifying to no more than was admitted by the defendant. Besides the value of all the property transferred, as found by the verdict of the jury, was only \$400, and no complaint is made that the damages are excessive. On the whole, we are unable to see that the court committed any material error in the rulings complained of.

The court instructed the jury very fully upon every question in the case. These instructions stated the law of the case fairly and clearly, and we fail to see that they were either contradictory or misleading. Several instructions asked by the defendant were refused, but we think, in so far as they were sound as propositions of law, they were embraced in other instructions given. It would subserve no useful purpose to speak of each of them separately.

The judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in Bank denied.

[No. 9615. Department One.—August 12, 1885.]

SACRAMENTO LUMBER COMPANY, RESPONDENT, v.
HELENA WAGNER ET AL. HELENA WAGNER,
APPELLANT.

MARRIED WOMAN—CONTRACT TO ASSUME INDEBTEDNESS—ORIGINAL OBLIGATION—STATUTE OF FRAUDS.—A married woman may enter into a contract to assume the payment of an indebtedness of a third person in consideration of the conveyance to her of a tract of land. The promise to answer for such indebtedness is an original obligation and need not be in writing.

CONTRACT FOR BENEFIT OF ANOTHER—ACTION ON—CONSIDERATION.—One in whose favor a contract is made may maintain an action thereon, although he was not a party to the agreement, and the consideration therefor did not move from him.

APPEAL from an order of the Superior Court of Sacramento County refusing a new trial.

The facts are stated in the opinion.

J. H. McKune, for Appellant.

Freeman & Bates, for Respondent.

BELCHER, C. C.—The defendants being husband and wife, bought the real property mentioned in the complaint in February, 1881. At the time of the purchase the defendant Helena paid one third of the purchase price with money which was her separate property, and for the other two thirds they gave their joint promissory note. Shortly after the purchase they commenced to erect a building on the premises, and obtained lumber and material therefor from the plaintiff. The lumber and materials furnished were charged to John Wagner, the husband. On the 4th day of April, 1881, the defendants reconveyed the property to Michael Wagner, their grantor, who held it until the 11th day of July following, and then for the expressed consideration of one dollar, conveyed it back to defendant Helena.

Between April 4th and July 11th, the construction of the building was continued, and materials therefor were furnished by the plaintiff and by Hartwell, Hotchkiss & Stalker, and charged to John Wagner. At the time of the conveyance to her on the 11th of July, defendant Helena agreed to pay the bills against the property, including the bills due the plaintiff and Hartwell, Hotchkiss & Stalker, and this she told the scrivener who drew the deed was a part of the consideration of the deed to her. On the same day she went with her husband to the plaintiff's managing agent and told him that she owned the property and was going to pay all the bills, and wanted to know how much discount the plaintiff would allow her if she paid the cash. She also went with her husband to the place of business of Hartwell, Hotchkiss & Stalker, and asked for their bill, and said she was going to pay it. The bills not being paid, Hartwell, Hotchkiss & Stalker assigned their bill to the plaintiff, and this action was brought to recover the amount of the two bills. The defendant John appeared and consented that judgment be taken against him as prayed for in the complaint. The defendant Helena answered with a general denial and a plea of coverture. The case comes here on an appeal by the defendant Helena from the order denying her motion for a new trial.

The fact that the appellant was a married woman cannot avail her in this case. She was not disqualified by reason of coverture from entering into a contract of the character indicated in the record. In this State "either husband or wife may enter into any engagement or transaction with the other, or with any other person respecting property, which either might if unmarried." (Civ. Code, § 158.)

The appellant accepted a conveyance of the property, and as a part consideration for that conveyance promised to pay the bills sued on. Even if the obligation to pay them rested on John Wagner, or Michael Wagner alone, still the appellant's promise to pay them was not void because not in writing signed by her. Section 2794 of the Civil Code provides: "A promise to answer for the obligation of another in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing. . . .

3. Where the promise being for an antecedent obligation of another, is made . . . upon a consideration beneficial to the

promisor, whether moving from either party to the antecedent obligation or from another person." It is claimed that the debt was the obligation of John Wagner, and that a promise made to John Wagner or Michael Wagner could not operate as a promise to the plaintiff, or to Hartwell, Hotchkiss & Stalker, on which they could sue for the reason that there was no privity between the parties.

The same point was made and maintained in *McLaren v. Hutchinson*, 18 Cal. 80. The court said: "In this case the defendant purchased of one Beach a tract of land, and as a part of the consideration agreed to pay certain debts specified in the complaint. Neither the plaintiff nor any of the persons to whom the debts were owing were parties to the agreement, and it does not appear that they ever assented to or attempted in any manner to connect themselves with the transaction prior to the commencement of the suit. The plaintiff is the present holder of these debts, and the question is whether he can maintain an action against the defendant for their recovery. It is clear, we think, that he cannot. There is no privity between the parties, and the legal position of the plaintiff is that of a stranger to the agreement."

The same point was again made in *Lewis v. Covillaud*, 21 Cal. 189, and speaking of *McLaren v. Hutchinson*, the court said: "In that case the suit was upon an agreement made by the defendant with a third person to pay a debt owing by the latter to the plaintiff, and we held that as the plaintiff was not a party to the agreement, the action could not be maintained. The decision was placed upon the ground that there was no privity; but since the case was decided the matter has frequently been called to our attention, and we are by no means satisfied with the rule laid down. The agreement was founded upon a sufficient consideration, and the modern doctrine in such cases seems to be in favor of the maintenance of the action."

We are satisfied that an action like that described in *McLaren v. Hutchinson* may be maintained, and that the court did not err in this case in rendering judgment in favor of the plaintiff. (*Barker v. Bucklin*, 2 Denio, 45; *Delaware and Hudson Canal Co. v. Westchester Co. Bank*, 4 Denio, 97; *Lawrence v. Fox*, 20

N. Y. 268; *Turk v. Ridge*, 41 N. Y. 206; *Barker v. Bradley*, 42 N. Y. 316; *Arnold v. Lyman*, 17 Mass. 400; 9 Am. Dec. 154.)

The order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the order is affirmed.

[No. 9781. Department Two.—August 17, 1885.]

MARKS ZELLERBACH, APPELLANT, v. CHARLES
ALLENBERG ET AL., RESPONDENTS.

JUDGMENT.—WHEN SET ASIDE ON THE GROUND OF FRAUD.—A judgment at law will be set aside on the ground of fraud only when the fraud was practiced in the act of obtaining the judgment, and the party against whom it was rendered and his counsel are free from negligence.

APPEAL from a judgment of the Superior Court of Sierra County.

The facts are stated in the opinion of the court.

R. H. Taylor, and *T. M. Osment*, for Appellant.

The judgment should be set aside because of the fraud practiced on the plaintiff. (*Foster v. Wood*, 6 Johns. Ch. 87; *Ocean Ins. Co. v. Fields*, 2 Story, 59; *Carrington v. Holabird*, 17 Conn. 530; *Cowin v. Toole*, 31 Iowa, 513; *Hayden v. Hayden*, 46 Cal. 332; *Pratt v. Northam*, 5 Mason, 95; *Noyes v. Loeb*, 24 La. An. 48; *Read v. Harvey*, 23 Ark. 44; *Warner v. Blakman*, 4 Keyes, 507; *Burch v. Scott*, 1 Bland, 112; *Ogden v. Larrabee*, 57 Ill. 389; *Shinkle v. Litcher*, 47 Ill. 216; *Hahn v. Hart*, 12 Mon. B. 426; *Wales v. Bank of Mich.* Har. (Mich.) 308; *Hubbard v. Hobson*, Breese, 190; *Baltzell v. Randolph*, 9 Fla. 366; 2 Story Eq. Jur. 894.)

Jarboe & Harrison, for Respondents.

MYRICK, J.—The complaint in this case was filed to set aside, on the ground of fraud, a judgment which had been

obtained by Allenberg and Goldstein against Zellerbach. In the court below, judgment on demurrer was rendered for the defendants.

The case, as presented by the plaintiff herein, why the judgment in the former case should be set aside, is substantially as follows: Allenberg and Goldstein commenced an action against Zellerbach to foreclose a mortgage executed by the latter to Allenberg. In the complaint in that case, it was alleged that the mortgage was given to secure the payment of a note for \$50,000 and interest, executed by Zellerbach to Goldstein, an indebtedness of Zellerbach to Allenberg of \$9,000 and interest, and advances and loans to be made by Allenberg to Zellerbach. It was also alleged that Allenberg paid out \$25,000 in excess of issues, in the management of the mortgaged property. The mortgaged property consisted of several mines and ditches and appurtenances, embracing all the property of Zellerbach in the county, together with 30,000 shares in a mining company, and 1000 shares in a canal company. Zellerbach, in his complaint in this case, avers that, in his answer in the former case he admitted the making of the note and the indebtedness to Goldstein, but claimed that Allenberg had received \$14,000 for dividends on the canal company stock, and \$1,500 cash.

The court in that action found that Zellerbach was indebted, on the obligations alleged in the complaint therein, in the sum of \$91,474.15, and that Allenberg had paid out \$11,251.41 in the management of the property, and rendered judgment of foreclosure and sale. The plaintiff Zellerbach then proceeded in his complaint in this action, to aver that he was extensively engaged in business; that Allenberg was his confidential agent and manager of his business, having almost exclusive control thereof; that Allenberg represented to plaintiff that money was needed to carry on the business, and that Goldstein had money to loan; that acting solely on the representations of Allenberg, he drew on Goldstein for \$30,000, which was paid; that Allenberg handed plaintiff \$7,853.15, representing it to be a loan from Goldstein, and that the \$50,000 note was given for these sums and interest thereon; that at the time he gave the note, and when the decree was rendered in the former action, he believed he was indebted to Goldstein in the sum named in the note, less the

credits claimed, but that since the date of that decree he had been informed and believed, and therefore alleged, on information and belief, that the sums supposed by him to have been loaned to him were, in fact, moneys which Allenberg had abstracted from him in the management of the business, and induced, by collusion with Goldstein, plaintiff to believe was the money of Goldstein, and was in truth the property of plaintiff.

It will be observed that the plaintiff in this action does not aver that Allenberg or Goldstein, by any act, prevented him from ascertaining before he executed the note the true condition of his affairs; neither does he aver that he could not, with the ordinary prudence of a business man, have ascertained such condition; for aught that appears, he might have examined his books and accounts then, and he might have examined them at any time before the trial of the former case. If it be true that Allenberg falsely abstracted the plaintiff's funds, and by collusion with Goldstein loaned them to plaintiff, it does not appear but that plaintiff might, with reasonable attention to his business, have ascertained the fact and made the defense in the former action.

It is not enough for the purposes of this action that he should have been ignorant of the alleged wrong at the time of the former trial; that ignorance must have been caused by the acts of Allenberg or Goldstein, or by his own misfortune, which reasonable prudence would not have guarded against. He does not aver that Allenberg had the entire management of the business, or that he made false entries in the books, or prevented inquiry or examination; nor does he aver any fact tending to show that Allenberg or Goldstein prevented him from making a defense nor from ascertaining the facts necessary to the defense.

Where a judgment is attacked and sought to be set aside for fraud, the "fraud must have been practiced in the very act of obtaining the judgment, or else it will be concluded by the judgment at law, where fraud is equally a defense as in equity." (2 Story's Eq. Jur. 1575.)

"The rule of the best considered and more recent cases upon the subject is that the party must have failed in obtaining redress in the suit at law by the fraud of the opposite party, or inevitable accident or mistake, without any default either of the

party or his counsel." (2 Story's Eq. Jur. 1574, n.; *French v. Garner*, 7 Port. 549; *Ede v. Hazen*, 61 Cal. 360; *Wier v. Vail*, 65 Cal. 466; *U. S. v. Throckmorton*, 98 U. S. 61.)

We think the judgment of the court below, in this case, is correct; it is therefore affirmed.

MORRISON, C. J., and THORNTON, J., concurred.

[No. 9685. Department One.—August 18, 1885.]

W. C. SHELDON, APPELLANT, v. A. MULL, RESPONDENT.

EJECTMENT—PROOF OF OUSTER—POSSESSION.—In an action of ejectment, an ouster by the defendant may be established without evidence that the land in dispute was enclosed so as to deprive the plaintiff of the possession thereof. Actual possession of land may be had without fences or enclosure.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

Freeman & Bates, for Appellant.

A fence is not essential to possession, and it was error for the court so to charge. (*Moss v. Scott*, 2 Dana, 274; *Elliott v. Pearl*, 10 Peters, 442; *Ewing v. Burnett*, 11 Peters, 41; *Ford v. Wilson*, 35 Miss. 505.)

A. P. Catlin, for Respondent.

SEARLS, C. — Ejectment to recover a strip of land.

The jury rendered the following verdict:—

"We, the jury in the above-entitled cause, find for the defendant, on the ground that he has not had possession of any of the land sued for."

Plaintiff and defendant were adjoining owners of land.

In December, 1881, defendant constructed a fence, apparently as and for a line fence between himself and plaintiff, but which was not on the line, being over on plaintiff's land, and leaving a narrow strip thereof on defendant's side.

The fence did not make an enclosure, extending only a portion of the way along the vicinity of the line, and at the end of such fence there was an open space by which egress and ingress could be had from and to plaintiff's land.

At the trial plaintiff asked the court to instruct the jury as follows:—

“It is not necessary for the plaintiff to show that the defendant surrounded the land in controversy by an enclosure. The defendant is to be deemed to be in possession of such part of the land, if any, as he occupied and used in the same manner that owners of land of like character in that neighborhood commonly occupy and use them.”

The court refused to give the instruction, which refusal was excepted to, and is assigned as error.

The court, at request of defendant, instructed the jury as follows:—

“In order to entitle plaintiff to recover the strip of land claimed in this action, it must appear to the jury from the evidence that defendant so enclosed the same as to deprive plaintiff of the possession of the same, and to appropriate the same to his own exclusive use, and that the land so enclosed belongs to plaintiff.”

The giving of which is also assigned as error.

It will be perceived that by the instruction refused and the one given the court indicated to the jury very clearly that to constitute an ouster it was necessary that defendant should have enclosed the land in dispute so as to deprive plaintiff of the possession thereof, and in defendant's third instruction the court told the jury they must be satisfied from the evidence that by means of fences defendant so enclosed the strip of land as to deprive plaintiff of the possession of the same.

Actual possession of land may be had without fences or enclosure. (*McCreery v. Everding*, 44 Cal. 246.)

Enclosing land by a fence is evidence of possession, but it is not the *only* evidence of possession.

He who enters upon land, occupies it, subjects it to his will and dominion for a purpose to which it is adapted, excluding all other persons therefrom, and is in the exclusive enjoyment of its advantages and products, is as much in the possession of such

land as though he had enclosed it with a fence. In *Suñol v. Hepburn*, 1 Cal. 254, the court held that the fact that cattle and horses of a person had roamed over and grazed upon a tract of land does not, of itself alone, make out an actual possession of the land in him.

A person, however, who marks off the boundaries of a tract of land reasonable in extent, and habitually uses the same for pasturage of stock, confining his cattle thereon, and excluding all others therefrom by the aid of herdsmen employed by him for that purpose, the land being adapted to the purpose indicated, is as much in the actual possession of such land as though he had enclosed it by a fence.

"The possession to be shown in the defendant in an action of ejectment need not be *actual*, as contradistinguished from *constructive*, in its character." (*Crane v. Ghiradelli*, 45 Cal. 236.)

In the present case there was evidence tending to show that defendant had built his fence over the line and upon the land of plaintiff.

The defendant, who was a witness in his own behalf, on cross-examination said: "Since December of last year I have used the land the same as before. Have run my sheep on it. I suppose the sheep run up to the new fence. I had the same use and occupation of the part up to the new fence as of any other part of my place, and I claimed the right to use up to that fence. I supposed the fence was on my land. I used the part adjoining the fence the same as I used all my high land."

This testimony tended to show that defendant was in possession of the land in dispute, claiming it as his own.

The instruction refused and those given, taken together, indicated to the jury that the evidence of possession in defendant was of no avail, and did not amount to an ouster, unless defendant had so enclosed the land as to deprive plaintiff of the possession of the same.

This was error for which the judgment should be reversed and a new trial granted.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is reversed and cause remanded for a new trial.

[No. 9543. Department One.—August 18, 1885.]

J. B. HAGGIN, RESPONDENT, v. A. F. RAYMOND ET AL.,
APPELLANTS.

EJECTMENT — CROSS-COMPLAINT — SPECIFIC PERFORMANCE — FINDINGS — VERDICT.—In an action of ejectment, where the defendant files a cross-complaint for the specific performance of a parol contract for a lease of the land in controversy, the issues so raised constitute a case in equity, and the verdict of a jury thereon is merely advisory, and may be disregarded by the court.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

J. H. McKune, Elwood Bruner, and A. P. Catlin, for Appellants.

H. O. & W. H. Beatty, for Respondent.

BELCHER, C. C.—This is an action of ejectment. The defendants answered, admitting the plaintiff's ownership of the demanded premises, and setting up by way of cross-complaint that they entered upon the premises and made valuable improvements thereon under a parol contract that the plaintiff would give them a written lease of the premises for a number of years; and they prayed for a decree compelling a specific performance of the contract.

When the case came on for trial the court ruled that the issues made by the cross-complaint and the answer thereto, must be first tried, and at request of defendants impaneled a jury to find upon those issues. At the close of defendants' testimony the court, on motion of plaintiff, granted a nonsuit as to the cross-complaint.

The defendants then waived a jury trial of the issues arising upon the plaintiff's complaint and their answer thereto, and the case was tried by the court. Judgment was rendered in favor of the plaintiff, and from that judgment and an order denying a new trial this appeal is taken.

There was no error in granting the nonsuit. The facts stated and the relief asked in the cross-complaint constituted a case in equity, and it is well settled that in such a case the verdict of a

jury is merely advisory and may be disregarded by the court. (*Bates v. Gage*, 49 Cal. 126; *Johnson v. Powers*, 65 Cal. 179; *Sweetser v. Dobbins*, 65 Cal. 529.)

The court found upon all the issues raised by the complaint, the cross-complaint and the answers thereto, against the defendants. It is now insisted that these findings were not justified by the evidence, and that the judgment should therefore be reversed.

We have carefully read over all the testimony found in the transcript, and are unable to agree with the views of the appellants. It would subserve no useful purpose to state the testimony at length, but we think it clearly appears that Mackay, plaintiff's agent, never pretended to have any authority to make leases, even for a year, and that plaintiff never held him out as an agent for that purpose. It does not clearly appear that Mackay ever made the agreement set up in the cross-complaint, and if it did there is nothing to show that the plaintiff knew of, or in any way ratified the unauthorized act.

The defendants had a lease for the year 1882, and they paid the rents; but the fact that the plaintiff received those rents could not have the effect to ratify the alleged agreement for a lease for three years, with a privilege of two years more.

The judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9739. Department One.—August 18, 1885.]

CHARLES M. COGLAN, RESPONDENT, v. M. R. BEARD,
APPELLANT.

BILL OF EXCEPTIONS—SPECIFICATION OF ERROR MUST BE PARTICULAR.—

A specification of error in a bill of exceptions that the findings are not justified by the evidence must state the particulars in which the evidence is alleged to be insufficient. A specification that "the court erred in finding" certain facts is not sufficiently particular.

ELECTION CONTEST—EVIDENCE—BALLOTS—BURDEN OF PROOF.—In an election contest the ballots are the primary and best evidence of the

number of votes received by any candidate, provided they have not in any way been tampered with; and the burden of proof is upon the contestant to show that fact.

ID.—CUSTODY OF BALLOTS BY CONTESTANT.—The ballots are not inadmissible in evidence by reason of the fact that for a short time they were in the possession of the contestant as *de facto* county clerk.

ID.—STATEMENT OF COUNT ON ONE TRIAL AS EVIDENCE ON SECOND TRIAL.—A tabulated statement showing the result of the count by the judge on one trial is admissible in evidence on a subsequent trial for the purpose of showing whether or not the ballots had been tampered with between the dates of the trials.

APPEAL from a judgment of the Superior Court of Sacramento County.

The facts are stated in the opinion.

John T. Carey, and *Wm. H. Beatty*, for Appellant.

W. C. Van Fleet, and *S. Solon Hall*, for Respondent.

BELCHER, C. C.—This is the second appeal in this case.

Upon the first appeal the judgment was reversed and the cause remanded for a new trial. (65 Cal. 58.)

On the second trial judgment was again rendered in favor of the plaintiff, and from that judgment this appeal is taken.

The findings fully support the judgment, and the only points made by the appellant are that some of the findings are not justified by the evidence, and that the court erred in admitting certain evidence against the objection of the defendant.

1. We cannot review the evidence for the reason that there is in the bill of exceptions no specification of the particulars in which the evidence is alleged to be insufficient to justify the findings. The specification is that "the court erred in finding" certain facts, but that does not meet the requirements of the Code. (Code Civ. Proc. § 648.)

But if the specifications had been sufficient the point would not have been well taken.

There was evidence, which if admissible, was sufficient to justify each of the findings of fact.

2. At the general election held in Sacramento County in November, 1882, the plaintiff and defendant were candidates for election to the office of county clerk. According to the returns of the election, as canvassed by the board of supervisors, the

defendant had a plurality of sixteen votes, and he received the certificate of election. In due time the plaintiff commenced this proceeding to contest the right of the defendant to the office. The case was tried before the Superior Court early in December, and in the course of the trial all the ballots cast at the election were brought into court and counted by the judge presiding. Judgment was rendered in favor of the contestant, and from that judgment Beard appealed on the 22d day of December, and within five days thereafter perfected his appeal by filing the necessary bond.

At the time the appeal was taken and perfected Thomas H. Berkey was clerk of the county, and the contestant Coglan was his deputy. Berkey's term expired on the 8th day of January, 1883, and on that day he turned the office and everything pertaining to it over to Coglan, who retained possession up to the time of the second trial of the case. Among other things of which he thus became custodian were the ballots cast at the election to which the contest relates. After the ballots were counted on the first trial, they were replaced by Berkey in the vault of the hall of records, and the vault was securely locked. When Berkey surrendered the office to Coglan he turned over to him also the keys to this vault. On the second trial the contestant first proved that the ballots were the genuine ballots delivered to the county clerk by the officers of the election; that they remained securely locked in a vault and in the same condition as when delivered, up to the time when they were brought into court to be counted on the first trial; that after they were counted they were returned by the judge, who had counted them, to their respective envelopes, and were again securely and carefully sealed up by him, and a strip of paper was gummed over the opening cut in the envelope, on which he wrote his initials; that they were then returned to the vault, and remained there in no way changed or tampered with until they were brought into court to be again counted on this trial. The contestant then offered in evidence the ballots from ten precincts of the county and asked that they be counted. The defendant objected to the ballots being received in evidence, or counted, upon the ground that it appeared that the said ballots and all ballots returned to the county clerk from the several precincts

of the county, had been, ever since the 8th day of January, 1883, in the sole and exclusive possession of the contestant; that they had therefore not been kept by the officer to whose custody the law committed them; that they should have been kept by the county clerk, and that contestant is not and never has been the county clerk, but has intruded himself into and usurped the office without any color of right thereto.

The court overruled the objection, and the ballots were then counted, the defendant reserving an exception.

We do not think the court erred in its ruling.

As soon as all the ballots are counted after an election they must be carefully sealed in a strong envelope by the officers of the election, and must then be delivered to the county clerk, who is required to keep the packages unopened, and unaltered for twelve months, unless within that time a contest in regard to the election is commenced and brought to trial. (Pol. Code, §§ 1259-1266.)

In case of a contest the ballots are the primary and best evidence of the number of votes received by any candidate, provided they have not in any way been tampered with; and the burden is upon the contestant to show that fact. (*People v. Holden*, 28 Cal. 133; *Coglan v. Beard*, 65 Cal. 58.)

After the 8th day of January, Coglan became the county clerk *de facto*, if not *de jure*, and the law gave him the custody of these ballots, and enjoined upon him the duty of taking care of them. This duty was performed in the interest of the public and not of himself. When the case came on for trial the fact that he had had the custody of the ballots should have led, and doubtless did lead the court to scrutinize them with greater care than it would if they had been produced from the custody of some other person; but it did not, we think, render them wholly inadmissible as evidence. The questions were, were they the genuine ballots cast by the voters, and had they been kept in the same condition that they were in when delivered by the officers of the election to the clerk? These questions being answered in the affirmative they were receivable in evidence. As was said in *People v. Livingston*, 79 N. Y. 287: "The preservation of the boxes inviolate being the ultimate object of the statute, if that is in fact accomplished, the omission to observe

all the formalities to secure that object is not fatal to the evidence. Such omission would weaken the force of the evidence and induce greater caution in regarding it, but would not necessarily destroy it."

2. The rule invoked by counsel for appellant that it is only as to the public and third persons that the acts of a *de facto* officer are held valid, and that they are not valid when they are for his own benefit, does not apply here. In keeping the ballots Coglan did not act for himself but for the public, nor is he alone interested in the controversy.

"The public is interested in a contest of this character; it is not a matter solely between the parties to the record." (*Searcy v. Grow*, 15 Cal. 119.)

"Theoretically the people alone are interested in the determination of the controversy involved in this case." (*People v. Holden*, 28 Cal. 139.)

3. The court admitted in evidence, against the objection of the defendant, a tabulated statement, showing the result of the count by the judge, on the first trial of the case, of the ballots recounted on this trial, and this ruling is assigned as error.

When the tabulated statement was offered it was admitted by counsel for defendant to be correct, and the only objection to it was that it was secondary evidence of the contents of the ballots, and that the ballots were the best and only competent evidence to impeach the returns of the precinct officers.

The principal point made by the defendant was that Coglan had had the custody of the ballots, and had had an opportunity to manipulate and change them, and therefore they were not admissible in evidence at all. And the burden, as we have seen, was upon him to show that they had not been changed.

It would seem that anything tending to show that fact was admissible, and what more persuasive evidence could be offered than a comparison of the results of the two counts? Certainly it would seem to follow, if the results were the same, that the ballots must have remained inviolate during all the time Coglan had the custody of them.

We do not think the court erred in receiving and examining the tabulated statement, showing the results of the count on the first trial.

The judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

[No. 9962. Department One.—August 18, 1885.]

A. F. JONES, RESPONDENT, v. WM. J. MORGAN,
APPELLANT.

MANDAMUS—PLEADING—CLAIM AGAINST A COUNTY.—In an application for a writ of mandate to compel a county treasurer to pay a warrant previously issued by the county auditor, a petition which alleges that the board of supervisors of the county audited and allowed the claim, and ordered the auditor to draw a warrant for its amount, and that the auditor in pursuance of this order issued, drew, and delivered to the claimant such warrant, is sufficient, although it does not follow the exact words of the statute.

PRACTICE—APPEAL—QUESTION EXCLUDED FROM THE ISSUES.—A question which has been excluded from the issues by the act of the appellant himself cannot be considered on appeal.

COUNTY OFFICER—CONTRACT WITH SUPERVISORS FOR EXTRA COMPENSATION—WHEN VALID.—A contract by which the board of supervisors of a county employ the district attorney of the county for a special compensation to attend to the interests of the county in a suit which is to be tried in another county after the expiration of his term of office, does not increase his salary as district attorney; and if the contract is made in good faith, it is not void.

APPEAL from a judgment of the Superior Court of the county of Butte, and from an order refusing a new trial.

The facts are stated in the opinion.

John C. Gray, for Appellant.

The demurrer should have been sustained. (Stats. 1883, p. 323.) The contract was void, being against public policy. (1 Dillon on Munic. Corp. 3d ed. §§ 233, 234, 444; *Andrews v. Pratt*, 44 Cal. 309; *San Diego v. S. D. & L. A. R. R. Co.*, 44 Cal. 106.)

T. B. Reardan & Son, for Respondent.

The contract was valid. (*Love v. Baehr*, 47 Cal. 364; *Hornblower v. Duden*, 35 Cal. 664; *Herrington v. Santa Clara Co.*

44 Cal. 502; *El Dorado Co. v. Elstner*, 18 Cal. 144; *Smith v. Mayor of Sacramento City*, 13 Cal. 532.)

FOOTE, C.—The plaintiff brought a petition for a writ of mandate in the Superior Court of Butte County, against the defendant as treasurer of that county, the object being to compel the treasurer to pay a warrant issued to the plaintiff previously by the auditor of the said county.

In referring to the action of the board of supervisors of said county in his petition, the plaintiff, among other things, avers: “that at the said December session of said board of supervisors the said board audited and allowed said claim of plaintiff in the sum of \$500, and ordered the auditor of Butte County to draw a warrant in favor of plaintiff on the defendant as treasurer of said county for said sum of \$500.”

This petition was demurred to and answered at the same time.

The grounds of demurrer were “that the petition did not state facts sufficient to authorize the court to grant the writ of mandate or to give any relief.” The demurrer was overruled. A trial on the merits was then had of the case by the court, a jury being waived.

The judgment of the court was to order a peremptory writ of mandate as prayed for, and for costs against the defendant.

A new trial was moved for and denied. On this motion a statement was agreed upon in open court, and by a stipulation it was afterward agreed that it should be the statement upon appeal.

From the judgment of the court, and its order denying the motion for a new trial, an appeal was taken.

The only ground relied on in argument by the appellant to reverse the court below in its ruling on the demurrer is that the complaint did not set out in reference to the claim of plaintiff “it was ordered paid” in the very language of the statute.

The complaint recited that the board of supervisors of Butte County “audited and allowed said claim of plaintiff in the sum of \$500, and ordered the auditor of Butte County to draw a warrant in favor of plaintiff on the defendant, as treasurer of said county, for said sum of \$500.”

It further alleged “that on the 12th day of December, 1884;

the auditor of said county of Butte, in pursuance to said order of the said board of supervisors of said county, issued, drew, and delivered to plaintiff a warrant for said sum of \$500."

The allegations in the complaint thus demurred to were, we think, entirely full and sufficient. A similar complaint to the one under discussion was held to be good by this court in the case of *Connor v. Morris*, 23 Cal. 451.

Upon the trial of the case at bar, it was stipulated by counsel in open court, that the only questions and issues to be submitted to the court were:—

1. Is the petitioner the party beneficially interested and owner of the warrant set forth in the petition?

2. Has the warrant set forth in the petition been duly presented to the defendant for payment, and payment demanded thereof and payment refused?

3. Has plaintiff (petitioner) suffered any damage by reason of the refusal of defendant to pay the warrant set out in the petition?

4. Is the warrant set forth in the petition founded on a legal claim against the county of Butte?

The court found that the warrant was the property of the petitioner; that it was duly presented to and refused payment by the defendant, and by reason of such refusal to pay it, no damage had resulted to the plaintiff.

Upon the first three propositions there can be no doubt of the correctness of the findings, and this is so plain that discussion of them is needless.

It is strenuously argued by the appellant, that the board of supervisors of Butte County *never ordered* the claim of the petitioner to be paid; but in his answer to the petition he did not deny the allegations of the complaint upon that point; hence those allegations are by the pleadings admitted to be true.

It being thus virtually admitted by the pleadings that the question raised by the appellant above alluded to is without the issues to be tried, and that too by the act of the defendant, he cannot be heard to complain here.

The appellant further contends that the trial court erred in overruling his objection to the introduction of warrant "No. 773" in evidence, but as the objector did not see proper to

include in the stipulation of issues to be passed on by the court any question as to the validity of the warrant on its face, but expressly agreed to exclude it, by agreeing that the issues thus submitted by the stipulation were the only issues, he could not under those issues thus limited be heard legally to object to the introduction of the warrant in evidence, nor can we entertain such objection here.

As to the point made that the contract was void and the warrant likewise, because the petitioner sought to have his salary increased, and that in allowing his claim and ordering the warrant to be drawn for it, the board of supervisors of Butte County increased his salary, it is plain from the evidence that no such thing was in contemplation or was done.

The evidence shows that the petitioner was district attorney of Butte County up to January 5, 1885; that the board of supervisors of that county employed him to attend to a case which was not to be tried until his term of office should expire; that the case had been transferred before his employment to Sutter County, and that the petitioner was retained to go into that county and look after the case and protect the interests of Butte County. The board of supervisors in their discretion certainly had the power, in this sort of a case, to employ counsel to attend to Butte County's interest in Sutter County, and the fact that they retained their then district attorney to go out of his own county, and attend to the case like any other attorney, and agreed to pay him for it, was not an increase of his salary for anything he had done, or ought to have done, or was to do while holding his office in Butte County.

But the last and most important objection raised by the defendant is that the contract on which the claim is based is void, for the reason, as he contends, that neither the petitioner could make such a contract with the board of supervisors, nor the board of supervisors with him. In this connection it is urged that a district attorney, being by law the legal adviser of the board of supervisors of his county, cannot make any contract with them as to any employment which entails any payment of money to him other than his compensation fixed by law.

It is urged that this cannot be done, because as a county officer, the district attorney cannot contract with the board of

supervisors of a county, he being like a director in a corporation, or a member of a town council, or a member of such board of supervisors.

The district attorney is the legal adviser of the board of supervisors of his county, and as to all cases of the county pending in the courts which it is his duty as district attorney to appear in and conduct, he can make no contract with that board to receive any compensation outside of that allowed him by law; but when it is sought by that board to secure his services as an attorney-at-law, and the services are to be rendered outside of the county of which he is district attorney, and the contract for their rendition is made in good faith, and they are of a character for which such a board in its discretion has the lawful right to employ counsel, we are not prepared to say it cannot be done.

The case of *Mayor etc. of Niles v. Muzzy*, 33 Mich. 62, is a case in point. Muzzy was an attorney at law, and also mayor and councilman of the town of Niles. While occupying the municipal office, that corporation employed him as an attorney at law, through its council, to attend to a suit in which it was interested in a neighboring court. He attended to the case in that tribunal, demanded his fee, it was refused payment, and he brought suit for it.

On the part of the town the point was urged that by reason of Mr. Muzzy being a municipal officer he could not claim pay for his services as an attorney at law; but the Supreme Court of Michigan declared that he was entitled to pay for such services, as there had not been shown in the case any fraudulent or collusive conduct on his part, or that of any other of the municipal officials.

In Kansas a county attorney recovered for services performed upon an implied contract in prosecuting a criminal action in a county of which he was not an officer, the action being one in which his county was interested. (*Huffman v. Board of Commissioners of Greenwood Co.*, 23 Kan. 281.)

We hold to the doctrine held heretofore by this court in the cases of *Andrews v. Pratt*, 44 Cal. 317, and *San Diego v. S. D. & L. A. R. R. Co.* 44 Cal. 106; but they were dissimilar to the case under consideration.

The petitioner here is neither a member of the board of supervisors of a county or a stockholder or director in a railroad cor-

poration, seeking to contract with himself on the part of the corporation or board of which he is a member.

There does not appear in the record before us any evidence that the petitioner has been guilty of the least bad faith in making his contract with the board of supervisors of Butte County, or that he or any one for him has exercised any undue influence over that board in the matter; neither is it evidenced in any way that such board of supervisors was beneficially interested in the claim, or was actuated throughout the transaction by any motive save that proceeding from an honest desire as guardians, so to speak, of protecting to the best of their skill and judgment the interests of said county, and in the utmost good faith toward all concerned.

We are of the opinion that the judgment and the order of the court denying a new trial ought to be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9753. Department One.—August 19, 1885.]

THOMAS J. CLUNIE, RESPONDENT, v. THE SACRAMENTO LUMBER COMPANY, APPELLANT.

EVIDENCE—DECLARATIONS OF AGENT.—In an action for the specific performance of a parol agreement entered into by an agent on behalf of his principal, declarations by such agent a year or two after the consummation of the agreement with respect to the terms thereof are inadmissible against his principal.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

Freeman & Bates, for Appellant.

A. P. Catlin, for Respondent.

FOOTE, C. — The plaintiff seeks to enforce the specific performance of a verbal agreement by compelling the defendant to exe-

cute a lease of certain premises for the term of five years. The findings of the court upon the facts, the evidence being conflicting, ought not to be disturbed unless something was improperly admitted which was injurious to the defendant.

It is claimed by counsel that the statements and declarations of Goodhue, the defendant corporation's general manager, made after his verbal agreement to lease for his principal the premises about which this contention is had, were incompetent as evidence to bind such principal, since they were narrations of facts which occurred at the time the agreement was entered into.

The evidence discloses the fact that those declarations and statements on the part of Goodhue were made a year or two after the alleged parol agreement for the lease of five years was consummated by him for his principal with the plaintiff, and that they set out and stated the terms and tenor of such agreement as understood by the parties thereto at the time of its completion.

We are of opinion that it was not proper to admit in evidence such declarations so made by the agent, as they did not bind his principal, not being a part of the *res gestæ*, and for this reason the judgment and order denying a new trial should be reversed. and a new trial granted.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

Hearing in Bank denied.

[No. 9784. Department One.—August 19. 1885.]

JANE L. CONNER, APPELLANT, v. LEE STANLEY,
ADMINISTRATOR OF THE ESTATE OF WM. JARVIS,
DECEASED, RESPONDENT.

EVIDENCE—CAPACITY TO CONTACT—OPINION OF WITNESSES.—The issue presented to the jury for their determination was whether or not a deceased person had in his lifetime been in such a state of mind as to have been unduly influenced to make the contract in suit by the plaintiff, who claimed and was believed by the deceased to be a spiritual medium. *Held*, that the opinion of witnesses as to the capacity of the deceased to make contracts with those whom he believed to be mediums was inadmissible in evidence.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are sufficiently stated in the opinion.

W. H. Beatty, and *Robt. T. Devlin*, for Appellant, cited *Fairchild v. Bascomb*, 38 Vt. 398; *Matter of Arnold*, 14 Hun, 525; *Walker v. Walker's Executor*, 34 Ala. 469; *State of Missouri v. Klinger*, 46 Mo. 224; *Van Zandt v. Mut. Ben. Life Ins. Co.* 55 N. Y. 169, 179; *Taylor v. Monnot*, 4 Duer, 116.

Freeman & Bates, and *Grove L. Johnson*, for Respondent, cited *Jacox v. Jacox*, 40 Mich. 476; *Thompson v. Hawks*, 14 Fed. Rep. 902; *James v. Johnson*, 12 Brad. Ill. App. 290; *Transportation Line v. Hope*, 5 Otto, 297; *Walsh v. Wash. Ins. Co.* 32 N. Y. 443; *Baldwin v. Parker*, 99 Mass. 83; *De Witt v. Barly*, 17 N. Y. 340; *Melendey v. Spaulding*, 54 Vt. 517.

FOOTE, C. — This action was tried by a jury, and the evidence before them warranted their verdict. The instructions given by the court fully and fairly stated the law of the case, and there is no objection urged on this score by the counsel for the appellant in their brief; the evidence, except as hereinafter stated, was properly submitted to the jury.

But the trial court against the plaintiff's objection allowed the following questions to be propounded to the witness Van Den Mark, and to be answered by him: "Q. — State whether Mr. Jarvis was competent to make a contract with a person that he believed to be a medium of communication between spirits of dead people and living persons?"

“Q.—What I mean is, do you think that he was competent to make contracts with those people that came to him and claimed to be mediums, whether or not they would have an undue influence over him?”

“A.—I think that they would make a contract; in making that contract they would have all the influence over him, and that he would do it under their supervision.”

And to the witness Peter Yager, the following question was allowed to be put and answered against the objection of the plaintiff:—

“Q.—Would a person professing to be a medium have more or less control over him than a person not professing to be a medium?”

“A.—Well a person that believed in his doctrine could do almost anything with him, and a person that did not believe in spiritualism he would not have anything to do with.”

This action was brought against the administrator of the decedent Wm. Jarvis, to enforce an alleged marriage contract by causing to be delivered to the plaintiff certain bonds, or their value to be paid her.

The issue which was raised by the pleadings and presented to the jury to be by them determined was whether or not the decedent had in his lifetime been in such a state of mind as to have been unduly influenced by the plaintiff to make the contract, who the evidence disclosed claimed to be and was believed by Jarvis to be, a medium of communication between spirits of dead people and living persons.

Those questions propounded to the witnesses above mentioned, and which were answered by them, involved the precise question which was presented by an issue to be tried by the jury, and by that means the province of that body was invaded. (*Walker v. Walker's Executor*, 34 Ala. 469, 473; *People v. Westlake*, 62 Cal. 305, 309.)

Hence for the reasons stated we are of opinion that the judgment and order denying a new trial should be reversed and a new trial granted.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

Hearing in Bank denied.

[No. 9669. Department One.—August 19, 1885.]

FRANCIS COX, APPELLANT, v. J. H. WOODS, ADMINISTRATOR OF THE ESTATE OF DIGGORY HOBBS, DECEASED, RESPONDENT.

EQUITY—REFORMATION OF WRITTEN INSTRUMENT—MISTAKE—EVIDENCE.

—A written instrument will not be reformed by a court of equity on the ground that there was a mistake in drafting it, unless the evidence of such mistake is clear, satisfactory, and free from reasonable doubt.

APPEAL from a judgment of the Superior Court of the county of Sacramento.

The action was brought to reform a promissory note, and for judgment thereon as reformed. The remaining facts are stated in the opinion.

D. E. Alexander, and Jay R. Brown, for Appellant.

J. C. Tubbs, for Respondent, cited Wachendorf v. Lancaster, 61 Iowa, 509; Bishop v. Clay Fire Ins. Co. 15 Rep. 432; Clay v. Currier, 17 Rep. 683; Willard's Eq. Jur. p. 64.

BELCHER, C. C.—Before a written instrument can be reformed, on the ground that there was a mistake in drafting it, the evidence that there was a mistake should be clear, satisfactory, and free from reasonable doubt. (*Wachendorf v. Lancaster et al.*, 61 Iowa, 509.)

The power of courts of equity to reform written instruments is one in the exercise of which great caution should be observed. To justify the court in changing the language of the instrument sought to be reformed, in the absence of fraud, it must be established that both parties agreed to something different from what is expressed in the writing, and the proof upon this point should

be so clear and convincing as to leave no room for doubt. (*Mead v. Westchester Fire Ins. Co.* 64 N. Y. 455. See also *Gillespie v. Moon*, 2 Johns. Ch. 585; *Hearne v. Marine Ins. Co.* 20 Wall. 490.)

In this case the proof was not clear and satisfactory to the court below that any mistake was made in drawing the note sued on. As written, it bore "interest at one per cent per annum," and it was claimed that the word "annum" was written by mistake in place of the word "month." The only witness called to prove the mistake was Nichols, who wrote the note. In his examination in chief he said: "The way I understand it the understanding was one per cent—twelve per cent per annum; that is what I paid Cox—what I took it for. I did not notice that the word 'annum' was in the note." In his cross-examination he first said: "The rate of interest was twelve per cent, one per cent per month." But when asked if he read the note to Mr. Hobbs and Mr. Cox after he had drawn it up, he said: "Yes, I called Mr. Cox's attention particularly to the word 'annum' in the note, and the agreement between him and Hobbs was one per cent."

This was all the testimony introduced upon the subject, and it certainly did not make the plaintiff's case so clear and convincing as to leave no room for doubt.

The last question to the witness was objected to by the plaintiff as irrelevant and immaterial, but we think there was no error in overruling the objection.

The judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

[No. 9522. Department Two.—August 21, 1885.]IN THE MATTER OF THE ESTATE OF C. C.
LUTHER, DECEASED.

ESTATES OF DECEASED PERSONS—FAMILY ALLOWANCE—WHEN PROPERLY REFUSED.—An order refusing a family allowance to the widow and children of a decedent to whom a homestead consisting of farming land, and also some personal property, had already been set apart, will not be reversed where the petition for such allowance contains no statement that the proceeds of the farm are insufficient.

APPEAL from an order of the Superior Court of the county of Stanislaus.

The facts are stated in the opinion.

Schell & Bond, for Appellant.

E. T. Stone, and *L. J. Maddux*, for Respondent.

FOOTE, C. — Appeal from an order refusing to make a family allowance to the widow and minor children of deceased. A homestead, consisting of 125 acres of farming land, also some personal property, had been set apart to the widow and children. The petition for family allowance did not contain a statement that the proceeds of the farm were insufficient. Therefore we cannot say that the court erred in refusing the allowance, and the order appealed from should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the order is affirmed.

[No. 9803. Department One.—August 22, 1885.]ANNA ELIZA DUFOUR, RESPONDENT, v. CENTRAL
PACIFIC RAILROAD COMPANY, APPELLANT.

CONTRIBUTORY NEGLIGENCE.—To authorize a recovery for an injury occasioned by the negligence of another, the party injured must have exercised such reasonable care to avoid the injury as a prudent person would have exercised under like circumstances.

Id.—On a review of the evidence, *held*, that the court could not say as a matter of law that there was any contributory negligence in this case.

INSTRUCTIONS.—A refusal to give instructions which have already been given in substance is not error.

Id.—SURROUNDING CIRCUMSTANCES.—An instruction that the jury in case they find for the plaintiff, "must take into consideration all the circumstances surrounding the case," cannot be construed as authorizing them to consider facts not embraced in the pleadings or evidence.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

S. C. Denson, for Appellant.

The decedent was guilty of contributory negligence. (*Fleming v. W. P. R. R. Co.* 49 Cal. 253; *Deville v. S. P. R. R. Co.* 50 Cal. 385.)

N. Greene Curtis, *F. H. Moore*, and *S. Solon Hall*, for Respondent.

Contributory negligence is a mixed question of law and fact. (*Fernandes v. Sac. City Railway Co.* 52 Cal. 45; *Andrews v. Runyon*, 65 Cal. 629; *Hynes v. S. F. & N. P. R. R. Co.* 65 Cal. 316; *Clayards v. Dethick*, 12 A. B. 439; *Ireland v. O. H. & S. Plank Road Co.* 3 Kerr, 533; *Kellogg v. N. Y. Central R. R. Co.* 24 How. Pr. 177; *Gaynor v. O. C. & N. R. Co.* 100 Mass. 21.)

SEARLS, C. — Action by plaintiff as the administratrix of her husband's estate to recover damages from defendant, a corporation, for the death of her husband through the alleged negligence of its employees. Verdict for plaintiff. Defendant appeals from final judgment and from an order denying a motion for a new trial.

Plaintiff's decedent was employed by the Friend and Terry Lumber Company to load lumber upon a car placed by defendant on a side track to receive its load. Decedent and another person were on this car loading lumber.

Before the accident happened all the load of lumber had been placed on the car, but it had not been leveled off and secured in place so as to be fit for shipment.

Decedent and his assistant were standing on the projecting ends of the longer timbers at opposite ends of the car leveling off the

load and preparing to fasten the same in place, when the defendant's employees, without giving any notice, ran up with a locomotive engine, coupled on to the train in which the lumber car was standing, and commenced moving in a southerly direction, and had moved several hundred feet and acquired a speed of five or six miles an hour when two heavy jerks of the cars occurred, the latter of which threw decedent from the ends of the lumber upon which he was standing between the cars where he was killed. The time consumed in passing from the starting point to where the accident occurred was from a minute to a minute and a half.

The defense of contributory negligence is set up, and appellant makes the point that the evidence was insufficient to justify the verdict.

The position taken is that conceding the negligence of defendant's servants in starting the train without notice whilst decedent was at work on the lumber, still the evidence shows that no injury was done him by this negligent start; that the shocks which afterward occurred, and by which he was thrown from the train were such as might reasonably be expected in a moving freight train, and that decedent ought to, and could by the exercise of common prudence have reached a safe position on the car. John J. Dufour, a brother of decedent, who was working with him on the car, and who was the principal witness for plaintiff, after describing the manner in which they were engaged says: "There were about seven thousand or eight thousand feet of lumber on the car, which made the top of the lumber about six feet from the platform of the car and about ten feet from the ground. My brother was standing on the north end of the car, and I on the south end. We were standing on the ends of the lumber that projected at such a height that the top of the lumber was about even with our hips.

"While we were standing in that manner smoothing the lumber preparatory for the cleats, the switch engine hooked on without any notice to us and started out with us. That is the first knowledge I had that they would take us away at all. Then we stopped our work and held on to the ends of the lumber with our hands to keep from falling off. There was a slight shock when they hooked on and started. That was the first intimation we had that they were moving or were going to move. Then

we went on down to the foot of N Street, and just as we crossed the street there were two heavy jerks. The first threw me backward and I caught the end of a scantling (the lumber was made up of everything, long stuff and some short stuff). Then immediately there was another shock which threw my brother off down between the cars." Again he says: "When the engine hooked on and started down we had no chance to get off. We could not get off without climbing on top."

The general rule is that to authorize a recovery for damages occasioned by the negligence of another, the plaintiff must have exercised that reasonable degree of care to avoid the injury which an ordinarily prudent person would have exercised under like circumstances.

Another rule in actions of this character is that it is incumbent upon the plaintiff to make out a *prima facie* case in his favor, showing that the damages claimed by him resulted from the negligence of the defendant. And where it affirmatively appears from his own evidence that the want of due prudence on his part was the proximate cause of the injury complained of, he cannot recover.

The plaintiff's right to recover is not affected by his having contributed to his injury unless he was in *fault* in so doing.

A plaintiff may not only contribute to, but even be himself the immediate cause of his own injury, and yet recover damages therefor.

If his share in the transaction was innocent and not incautious, it furnishes no excuse for defendant, as in a case where by the negligence of a railroad company the train was run into such danger that in order to escape from greater peril the plaintiff jumped off and thus injured himself, he recovered damages against the company. (Sherman & Redfield on Negligence, § 28.)

Where the negligence of plaintiff is relied upon to defeat his recovery, he must have been guilty of at least *ordinary* negligence. His failure to use *great* care will not defeat the action. (Sherman & Redfield, § 29.) In the present case it was the duty of plaintiff's decedent to use such care and diligence in protecting himself from harm as would have been exercised by a man of ordinary prudence, placed in his position.

It is claimed by defendant that he should have climbed upon the top of the lumber where he would have been safe from the

shocks incident to moving freight cars upon a side track, with which we may suppose him to have been familiar. This is an assertion easily made, but it is not clear that it could have been readily and safely accomplished.

The shocks spoken of, and which accompany the starting and stopping of a train, or altering its rate of speed, and with which decedent was familiar, may have rendered it both natural and necessary for him to do what he and his associate both did, viz., hold on to the timber. The jury may have concluded from the circumstances that such was the safest course to pursue.

We cannot say, as a question of law, that decedent was guilty of contributory negligence in maintaining as best he could his position.

The law can only define the duty of individuals under given circumstances. The existence of the circumstances is a question of fact for the jury.

Under the instructions of the court, as given, and the testimony before them, we are of opinion the jury was warranted in the verdict rendered.

Appellant takes exception to the use of the word "stop" in the sixth instruction given on request of plaintiff.

The paragraph in which the word "stop" occurs proceeds upon the theory that if defendant by its agents carelessly and negligently caused the train of cars to move or start without giving any warning to deceased of its intention to move said cars, and did move or start or *stop* the same with such force or violence as to cause deceased to fall off"

Under the pleadings and evidence the court was warranted in giving the instruction as asked.

The gravamen of the charge as contained in the complaint, is that defendant by its servants negligently and carelessly and without notice to deceased did move its locomotive and cars so as "to back and move the same with great force and violence" and "by reason of the great force and violence used in backing and moving said cars, and of the great shock occasioned thereby, and the failure and neglect of said defendant to give any warning or notice thereof, said deceased was thrown from and off of said car"

Manifestly the complaint taken together charges that by reason of the shock given to the car upon which decedent was at

work, he was thrown off and killed. Whether the shock was produced by starting or stopping the train, by accelerating or checking its motion, is of little consequence, as the allegations are broad enough to authorize proof of the fact of stopping, as shown by the evidence, and the shock to the car occasioned thereby.

The refusal of the court to give the twelfth and seventeenth instructions as asked by defendant is assigned as error.

These instructions had already been given in substance, and very nearly in the same form at the request of defendant. The whole question of contributory negligence, so far as applicable to the case made, was clearly expounded to the jury, and to have repeated the same doctrine in synonymous language or terms of like import was unnecessary.

In defendant's reply brief, the point is for the first time urged, that the seventh instruction given at the request of plaintiff is erroneous.

The court had instructed the jury that in case they found for plaintiff they "must take into consideration all the circumstances *surrounding the case.*"

It is claimed the italicized words used imparted to the jury that they were at liberty to go outside of the case as made, for circumstances upon which to predicate their verdict. The circumstances surrounding a case are such as are to be gleaned from the pleadings and evidence, and we must presume that it was to the circumstances appearing properly in the case, and not those outside of it and of which the jury are not presumed to know, that the court alluded in this instruction, and that the jury so understood it.

We think the judgment of the court below and the order denying the motion for a new trial should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9769. Department One.—August 22, 1885.]

MIRANDA R. TRYON, RESPONDENT, v. J. L. HUNTOON, ADMINISTRATOR, ETC., OF E. L. BILLINGS, DECEASED ET AL. L. N. AND D. D. BILLINGS, APPELLANTS.

DEED—CONSIDERATION MOVING FROM STRANGER—TRUST—PRESUMPTION—EVIDENCE.—When a transfer of real property is made to one person, and the consideration is paid by or for another, the presumption of a trust in favor of the person by or for whom the payment is made may be rebutted by evidence showing a different intention between him and the grantee.

ID.—UNCERTAINTY OF DESCRIPTION.—A deed describing the property intended to be conveyed as “three fractions of lot seven, J and K, Fourth and Fifth streets, Sacramento City,” is void for uncertainty.

ID.—COLOR OF TITLE—POSSESSION—STATUTE OF LIMITATIONS.—Such a deed is sufficient to give color of title, and possession under it for the requisite time will give a perfect title under the Statute of Limitations.

ACTION TO QUIET TITLE—HEIRS MAY MAINTAIN OR DEFEND—JOINDER OF ADMINISTRATOR—DISMISSAL.—An action to quiet title to land, under section 1452 of the Code of Civil Procedure, may be maintained or defended by the heirs of a deceased intestate in their own name, without joining the administrator; and where the administrator is originally joined as a defendant with the heirs, and judgment is rendered against them, an order dismissing a motion for a new trial as to the administrator is without injury to the heirs.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial, and from an order dismissing the motion for a new trial as to one defendant.

The facts are stated in the opinion.

McKune & George, for Appellants.

Upon it being shown that the consideration for the deed to the plaintiff was paid by her brother, the presumption attached that the conveyance was in trust for his benefit, and the burden of proof was upon the plaintiff to rebut the presumption. This she has not done. (Civ. Code, § 853; Perry on Trusts, §§ 126, 139; *Case v. Coddington*, 38 Cal. 191; *Millard v. Hathaway*, 27 Cal. 119; *Bayles v. Barter*, 22 Cal. 575; Hill on Trusts, 96, 97; *Dudley v. Bosworth*, 10 Humph. 9; *Madison v. Andrews*, 1 Ves. 58; *Forrest v. Forrest*, 37 Law. J. Ch. N. S. 428.)

Hart & White, for Respondent.

Young & Young, for Administrator.

SEARIS, C.—An action to quiet title to the west twenty feet of lot number six, and the east five feet of lot number seven, in the block or square bounded by Fourth and Fifth, J and K streets, Sacramento.

Plaintiff had judgment, and defendant moved for a new trial, pending which motion J. S. Huntoon, administrator of the estate of E. L. Billings, deceased, one of the defendants, consented to the dismissal of the action as to him. The motion was overruled as to the defendants L. N. Billings and D. D. Billings, who appeal from the judgment, from the order denying the motion for new trial, and from the order dismissing, as to Huntoon, the motion for new trial.

E. L. Billings, who was a brother of appellants and respondent, died intestate in Sacramento, January, 23, 1883. He was a native of Canada, and came to California in 1852, where he accumulated a large property and continued to reside until his death.

When E. L. Billings was about to come to California, his sister, the plaintiff, then twenty-one years of age and unmarried, was engaged in teaching school at eight dollars per month.

From her slender earnings she furnished him \$100 to assist him in defraying the expenses of his journey. In 1858, according to the findings of the court, E. L. Billings procured the owners of the land in dispute to convey the same to his sister, the plaintiff herein, for a consideration of \$7,000, which was paid by him.

Before that time, viz., on the 21st day of November, 1855, said E. L. Billings had procured the then owners of the premises to convey, and they had conveyed, the undivided one half of said premises to plaintiff, the consideration for which was paid by Billings.

Plaintiff was at that time in Vermont, and knew nothing of the conveyance to her until informed thereof by deceased, who at the same time requested a power of attorney from her authorizing him to take possession of, lease, and sell all lands which she had or might thereafter have in Sacramento City. She executed and returned to deceased the power of attorney.

The question in the court below was to the nature of the transactions by which title to the property vested in the plaintiff.

She claims the property was conveyed to her as a gift from her brother on account of the love and affection he bore her, while defendants, on the other hand, assert that the property was only conveyed to her as a convenience, and as a precaution against unforeseen misfortunes in business, and that deceased having advanced the purchase money, plaintiff took the legal title in trust for him.

Under section 853 of the Civil Code, it is provided that "when a transfer of real property is made to one person, and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."

This presumption raised by law in favor of him by whom or for whom payment is made, is based upon the fundamental idea that the parties *must have intended* that he by whom or for whom the purchase price of land is paid should have an equitable interest therein.

Experience has found this intention to appear so uniformly in such cases as to warrant the inference or presumption of its existence in all cases. The only effect of this presumption is that it arises upon proof of the facts upon which it is predicated without further proof as to what the real intention of the parties may have been, but it is not an irrebutable presumption. It may be removed or overcome by proof, by showing that between him who advanced the consideration and the grantee it was *not intended* that a trust should arise in favor of the former.

That was the precise point to which evidence was introduced at the trial of this cause, and the findings of the court below are in favor of the plaintiff on all the issues.

We think there was testimony in favor of plaintiff sufficient to support these findings.

It would seem that plaintiff was the favorite sister of deceased. She furnished him, in part at least, with the means to come to California. It was with her he corresponded, and from her he sought and obtained information in reference to the other members of his family.

Bound to her by ties of affection as well as of blood, and under obligations to her for the aid which made his success in life possible, it is not deemed strange when fortune had favored

him, the deceased was disposed to place in the name of this valued sister the property involved in this action, in order that in case of death she might to that extent be preferred to the large number of his other heirs. Under such circumstances we cannot interfere with the findings of fact. It is objected that title to the east five feet of lot seven never vested in plaintiff.

A deed from Samuel Brannan to Daniel K. Brannan, dated October 11, 1851, and forming a link in plaintiff's chain of title, describes this land as follows: "Three fractions of lot seven, J. and K, Fourth and Fifth streets, Sacramento City." This deed is void, for uncertainty of description, and no title vested in the grantee by virtue of said deed, to any portion of lot seven. (*Schackelford v. Bailey*, 35 Ill. 387; *Bean v. Thompson*, 19 N. H. 290; 49 Am. Dec. 154; *Haven v. Crain*, 1 N. H. 93; *Holmes v. Strautman*, 35 Mo. 293.)

It seems, however, that the grantee under the deed entered into possession conveyed by deed in due form to one S. S. Crane, in 1854, under whom by sundry mesne conveyances plaintiff claims title.

The deed was sufficient to give *color of title* and possession under it for thirty years and upward by plaintiff, and her grantors claiming title is sufficient to give a perfect title under the Statute of Limitations.

But conceding that title to the fraction of lot seven never vested in plaintiff or her grantors, we fail to see how defendants are benefited thereby. They claim as the heirs at law of E. L. Billings. Their contention is that the very title they would assail is held by plaintiff in trust for them. Its existence is not denied; its validity is not assailed by their answer or cross-complaint, but as beneficiaries they ask that plaintiff be adjudged to convey to them.

There was a quit-claim deed from one Eli Mayo to E. L. Billings, dated August 8, 1868, admitted in evidence, covering lot seven, and a deed of bargain and sale to Mayo from L. H. Foote and Richard Jones, dated August 17, 1868, to this same lot.

As no title is shown in either or any of the parties thus conveying, nothing can be claimed for these deeds, except that they

gave to defendants' intestate color of title, under which to inaugurate an adverse possession to plaintiff; but this claim is met by the finding of the court that the intestate never did hold adversely, but always in subordination to the title vested in plaintiff.

The letter from E. L. Billings to his sister, the plaintiff, dated December 4, 1855, was properly excluded. It simply instructed plaintiff as to the proper course to pursue in executing the power of attorney, and contained news as to the health of the writer and mutual friends, and a few items of family matters, and while its admission could have done no harm, it was immaterial to the issues in the case.

The testimony of plaintiff on cross-examination, as to a conversation between herself and decedent, in 1859, when the latter visited Canada, was proper. She had been called by the defendants as a witness on their behalf, and an attempt had been made to prove by her that she had no knowledge of the deed taken in her name except that contained in the letters offered in evidence. It was under these circumstances proper to show, on cross-examination, that she had other knowledge, gained through her brother's statements, relating to the same subject-matter. Neither do we think the court erred in dismissing the motion for new trial, as to the administrator J. L. Huntoon, at his request. Appellants were in no way injured thereby.

By section 1452, of the Code of Civil Procedure, appellants, as heirs of E. L. Billings, may, in their own name, maintain or defend an action to quiet the title to the land in controversy.

This they have done as fully and effectually as though the administrator had continued to act with them.

The right of an administrator to judge for himself under such circumstances, when to cease litigation, cannot be doubted, and when we consider that judgment had been rendered against him, and that as the fruits of the dismissal of the motion for new trial, he was absolved from all claim for rents and profits, to which the estate in his hands would have been liable under the judgment, we concur in the wisdom of the policy as well as in the right to adopt it.

After a careful examination of the whole record we conclude the judgment and orders appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and orders are affirmed.

Hearing in Bank denied.

[No. 11025. Department Two.—August 22, 1885.]

MAURICE FINN, APPELLANT, v. D. B. SPAGNOLI,
RESPONDENT.

MOTION FOR NEW TRIAL.—HEARING AND DETERMINATION OF MOTION A TRIAL.—The hearing and disposition of a motion for a new trial is a trial within the meaning of section 398 of the Code of Civil Procedure.

Id.—CHANGE OF PLACE OF TRIAL.—DISQUALIFICATION OF JUDGE.—Where pending the settlement of a statement on motion for a new trial, the term of office of the judge who tried the case expires, and one of the attorneys in the action becomes his successor, the party moving for a new trial is entitled, under section 398 of the Code of Civil Procedure, to have the action transferred to an adjoining county, on the ground of the disqualification of the judge before whom the case is pending.

APPEAL from an order of the Superior Court of Amador County refusing a change of the place of trial.

The facts are stated in the opinion.

Eagon & Armstrong, for Appellant.

The plaintiff was entitled to a change of venue on the ground of the disqualification of the judge. (Code Civ. Proc., §§ 170, 397; *North Bloomfield G. M. Co. v. Keyser*, 58 Cal. 315; *Barnhart v. Fulkerth*, 59 Cal. 130; *Livermore v. Brundage*, 64 Cal. 299; *Connell v. Gavitt*, 7 Colo. 40.)

Lindley & Spagnoli, for Respondent.

BELCHER, C. C. — The plaintiff recovered judgment against the defendant in the Superior Court of Amador County on the 18th day of November, 1884. Thereafter, within the time allowed by law, the defendant served a notice of his intention to move for a new trial, and prepared and served his statement of

the case, and the plaintiff prepared and served amendments to the statement. The statement and amendments were delivered to the clerk of the court for the judge. On the 5th day of January, 1885, the term of office of the judge before whom the case was tried expired, and the attorney who tried the case for the defendant became the judge of the court. Nothing appears to have been done towards settling the statement till the 6th of March, when the plaintiff gave notice of his intention to move that the case be transferred to the Superior Court of an adjoining county, upon the ground that the judge of the court was disqualified from further acting in the case. This motion was heard on the 16th day of March, and at that time the judge of the Superior Court of Mono County occupied the bench. The motion was denied, and the appeal is from the order denying it.

A bill of exceptions or statement may be settled and certified by the judge before whom the case was tried after his term of office has expired, if he has not become disqualified, or by his successor in office, if he be not disqualified. If the former neglects or refuses to act, and the latter be disqualified, then the bill of exceptions or statement is to be settled and certified by another judge of the same county, if there be one, or by the judge of an adjoining county. (§ 653, Code Civ. Proc.; Rule 29 of this court.) The case was pending in the Superior Court of Amador (Code Civ. Proc. § 1049), and the plaintiff was entitled to have the statement settled and the motion for new trial disposed of without unnecessary delay. Why the statement was not settled by the judge before whom the case was tried does not appear, but it could not be settled by his successor in office, nor by the judge of Mono County, that not being an adjoining county.

Section 398 of the Code of Civil Procedure provides: "If an action or proceeding is commenced or pending in a court, and the judge or justice thereof is disqualified from acting as such . . . it must be transferred for trial to a court the parties may agree upon by stipulation in writing, or made in open court and entered in the minutes; or if they do not so agree then, to the nearest court where the like objection or cause for making the order does not exist."

It is claimed by the respondent that the case had been tried, and therefore it could not be transferred for trial.

This is not correct. "A trial is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial." (*Tregambo v. Comanche M. & M. Co.* 57 Cal. 505.)

Within this definition the hearing and disposition of a motion for new trial is a trial.

We think the court erred in denying the plaintiff's motion, and that the order appealed from should be reversed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the order is reversed.

[No. 11024. Department Two.—August 22, 1885.]

TERESA BOTTO, RESPONDENT, v. JACOB VANDAMENT,
APPELLANT.

JUDGMENT ON PLEADINGS—INCONSISTENT DEFENSES—DENIALS AND ADMISSIONS.—A judgment on the pleadings is not authorized if the answer deny the material allegations of the complaint, although in a special defense separately stated the allegations formerly denied are admitted.

APPEAL from a judgment of the Superior Court of Amador County.

The facts are stated in the opinion.

Eagon & Armstrong, for Appellant.

Several defenses inconsistent with each other may be set up in a verified answer. (*Bell v. Brown*, 22 Cal. 672; *Wilson v. Cleveland*, 30 Cal. 192; *Buhne v. Corbett*, 43 Cal. 269; *Movenhaut v. Wilson*, 52 Cal. 268; *Billings v. Drew*, 52 Cal. 565.) Judgment for the plaintiff on the pleadings cannot be rendered when the answer denies any of the material allegations of the complaint. (*Miles v. McCallan*, 1 Ariz. 491; *Reich v. Rebel-*

lion Silver Mining Co. v. Utah, 254; *Nudd v. Thompson*, 34 Cal. 39; *Amador v. Butterfield*, 51 Cal. 526; *Forrester v. Flores*, 64 Cal. 24; *Hicks v. Lovell*, 64 Cal. 14.)

Rust & Caminetti, for Respondent.

FOOTE, C. — This cause comes here from the Superior Court of Amador County on appeal from a judgment for the plaintiff on the pleadings. The plaintiff sued for damages for the taking of water from a ditch belonging to her, and for the restitution of certain water and water privileges, and prays for a perpetual injunction to restrain the defendant from further using or interfering with said water or water privileges.

The defendant denied specifically the allegations of the complaint, plead the Statute of Limitations of five years, under section 319 of the Code of Civil Procedure, and as a further and separate defense plead that his wife Julia A. Vandament was the true owner of the ditch, the water and water privileges, and that he, by her permission and as her agent, was using the same, and disclaimed any further right of possession to or interest in the subject-matter of the suit.

The case at bar being in this condition, a motion was made by the plaintiff for judgment on the pleadings, and that motion was granted, and judgment in accordance with it rendered by the trial court.

This court said in the case of *Hicks v. Lovell*, 64 Cal. 17, citing *Prost v. More*, 40 Cal. 347: "It is only where an answer admits or leaves undenied the material facts stated in the complaint that a judgment can be rendered on the pleadings."

It has been also held by this court in the cases of *Nudd v. Thompson*, 34 Cal. 39, and *Amador County v. Butterfield*, 51 Cal. 526, that judgment cannot be rendered on the pleadings, where the material allegations of the complaint are denied in the answer, even if the answer sets up a special defense separately stated, which admits the allegations formerly denied. No motion was made to strike out any part of the answer, or any demurrer interposed.

If it be true that the several defenses set up in the answer are not consistent with each other, nevertheless a moving party

would not be entitled on that account to judgment on the pleadings, as this court has held in *Buhne v. Corbett*, 43 Cal. 269; *Billings v. Drew*, 52 Cal. 565, and other well-known cases.

In this case a plea of the Statute of Limitations was set up and was neither stricken out nor demurred to; hence an issue of fact remained which the defendant was entitled to have tried.

And the defense set up that the defendant's wife owned the subject-matter of the suit, and that he as her agent, and by her authority, was in possession of and using the same, raised another issue of fact entitled to trial. (*Farmers' and Mechanics' Bank v. Christensen*, 51 Cal. 571.)

The judgment on the pleadings rendered in this case is not warranted in law, and a new trial ought to be granted in accordance with the views herein expressed.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded for a new trial.

[No. 8370. Department Two.—August 22, 1885.]

A. S. FULKERTH, APPELLANT, v. THE COUNTY OF
STANISLAUS, RESPONDENT.

CLAIMS AGAINST COUNTIES—MEALS FURNISHED PRISONERS—COMPENSATION—ACTION FOR.—The sheriff of a county, if he is dissatisfied with the amount of compensation allowed him by the board of supervisors for meals furnished to prisoners confined in the county jail, may bring an action against the county for the amount which he claims to be reasonable.

APPEAL from a judgment of the Superior Court of the county of Stanislaus.

The facts are stated in the opinion.

Wright & Hazen, for Appellant, cited *Price v. The County of Sacramento*, 6 Cal. 255; *The County of Grundy v. Hughes*, 8 Bradwell (Ill.) 34; *State v. County Judge of Floyd Co.* 5 Iowa, 380; *Wappello v. Sinnamon*, 1 Greene, 413; *Board of Com. of*

Bartholomew Co. v. Ford, 27 Ind. 17; *Winslow v. Com. of Perquimans Co.* 64 N. C. 218; *Antanga County v. Davis*, 32 Ala. 703.

T. A. Coldwell, for Respondent, cited *El Dorado Co. v. Elstner*, 18 Cal. 144; *Robinson v. Supervisors of Sacramento Co.* 16 Cal. 208; *Fall v. Paine*, 23 Cal. 302; *Hornblower v. Duden*, 35 Cal. 664; *Tilden v. Sacramento County*, 41 Cal. 68; *Colusa County v. De Jarnett*, 55 Cal. 373.

BELCHER, C. C. — The plaintiff was sheriff of the defendant county during the year 1881, and as such furnished meals to the prisoners confined in the county jail. For the meals so furnished he made out an account in proper form, and duly verified and presented it to the board of supervisors for allowance. In this account he charged twenty-five cents for each meal furnished. The board acted upon the account and found it to be a proper county charge, but considering it greater in amount than was justly due, allowed twenty cents only for each meal. The plaintiff being dissatisfied with the amount allowed him, within six months after the final action of the board commenced this action to recover the amount claimed by him to be due. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and its demurrer was sustained. The plaintiff declined to amend his complaint, and thereupon judgment was entered in favor of the defendant. The appeal is from this judgment.

For the respondent it is insisted — and this is the only point made — that the board of supervisors in allowing or disallowing claims against the county, acts in a quasi-judicial capacity, and that its action in this case was made final and conclusive by the provisions of section 1611 of the Penal Code. That section reads as follows: "The sheriff must receive all persons committed to the jail by competent authority, and provide them with necessary food, clothing, and bedding, for which he shall be allowed a reasonable compensation, to be determined by the board of supervisors."

We do not think the words "to be determined by the board of supervisors" had the meaning and effect claimed for them.

All claims against the county must be presented to the board of supervisors for allowance, and where the amount of the claim

has not been fixed by statute or the judgment of some competent court, the board is required if it be a proper county charge to find and allow the amount which is justly due. (Pol. Code, § 4074.)

If the board allows less than is claimed, and claimant is dissatisfied with the amount allowed him on his account, he "may sue the county therefor at any time within six months after the final action of the board, but not afterwards; and if in such action judgment is recovered for more than the board allowed on presentation of the judgment, the board must allow and pay the same, together with the costs adjudged; but if no more is recovered than the board allowed, the board must pay the claimant no more than was originally allowed." (Pol. Code, § 4075.)

This provision is general, and applies to all accounts presented against the county.

By subdivision 4 of section 4344 of the same Code, the "expenses necessarily incurred in the support of persons charged with or convicted of crimes and committed therefor to the county jail," are made county charges.

The plaintiff having furnished "necessary food" to the prisoners in jail, was entitled to a "reasonable compensation" therefor. What was a reasonable compensation was to be determined by the board of supervisors in the first instance, but that determination was no more final than would have been the finding by the board of the amount which was justly due if the account had been presented for any other proper county charge.

"To determine what is a reasonable compensation," and "to find what is justly due," are expressions we think of equivalent import. The plaintiff being dissatisfied with the amount allowed him on his account, had the right therefore to sue the county for the amount which he claimed to be reasonable.

The cases cited by counsel for respondent from the reports of this State do not touch the question involved here, and those cited from New York are not in point for the reason that no law existed in that State providing for suit upon a claim disallowed in whole or in part by the board. (*Chase v. The County of Saratoga*, 33 Barb. 603; *Martin v. Board of Supervisors*, 29 N. Y. 645; *Price v. County of Sacramento*, 6 Cal. 254.)

Judgment should be reversed and the cause remanded with direction to the court below to overrule the demurrer.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded with direction to the court below to overrule the demurrer.

[No. 9982. Department Two.—August 22, 1885.]

JAMES B. PENDOLA, APPELLANT, v. ANDREW ALEX-
ANDERSON ET AL., RESPONDENTS.

MORTGAGE—PURCHASER AT FORECLOSURE SALE—RENTS AND PROFITS.—

A mortgagee who has purchased the mortgaged property at a foreclosure sale is not entitled to any of the rents and profits which accrued prior to the time of his purchase; and where the property is in the hands of a receiver, the mortgagee cannot sue the latter for the rents and profits until they have been collected and received.

APPEAL from a judgment of the Superior Court of Sierra County.

The facts are stated in the opinion.

Van Clief & Wehe, for Appellant.

John Gale, for Respondents.

BELCHER, C. C. — The defendants, Andrew and Nellie Alexander, were husband and wife, and had one minor child; they had no common property, but the husband owned all the property described in the complaint as his separate property. On the 2d day of November, 1881, the wife commenced an action against her husband for a divorce and asked for the custody of the child and for alimony; and on the same day filed a notice of *lis pendens*, containing the names of the parties, the object of the action, and a description of the property of the husband.

After the filing of the *lis pendens*, but on the same day, the appellant Pendola, in good faith and without any intention of preventing the wife from securing the payment of any alimony

that might be adjudged to her, took a mortgage from the husband upon all of his said separate property to secure an indebtedness of about \$1,100, which mortgage was then duly recorded.

On the 12th day of November, 1881, the action for divorce was tried and a decree entered, granting to the plaintiff a divorce, the custody of the minor child, and alimony at the rate of forty-five dollars per month until the further order of the court, payable out of the rents, issues, and profits of the said separate property of the husband; and it was further decreed that the alimony "be a first charge" upon the said property. To secure the payment of the alimony the court appointed the defendant Fendingham receiver, with authority to take possession of the property and to collect and pay over the rents, issues, and profits thereof. Fendingham accepted the trust, and continued to act under his appointment until this action was tried.

In March, 1884, the appellant commenced an action to foreclose his mortgage, but did not make Fendingham or Nellie Alexanderson parties to the action. In June he obtained a decree of foreclosure, and under that decree on the 19th day of July, 1884, all of the mortgaged property was sold and bid in by him for the sum of \$1,268.59, the amount then due, with costs of sale.

This action was commenced on the 21st day of July, 1884, to recover from the receiver Fendingham, "all the proceeds, rents, issues, and profits received or to be received by him from the property above described as that sold to plaintiff by said sheriff," and for such other relief as should seem equitable.

The case was tried, and on the 29th day of September judgment was entered, in effect, requiring the receiver, within ten days after service on him of a copy of the judgment, to pay to Nellie Alexanderson the amount due her for alimony up to July 21, 1884, and to pay to the clerk of the court for the use and benefit of the plaintiff all the balance of the money then in his hands, derived from the rents, issues, and profits of the property which he had held as receiver, less the expenses of his receivership; and it further required him to render to the court a full account of his receipts and his disbursements at the time of such payments.

The appeal is from this judgment and rests upon the judgment roll.

It is not easy to see how appellant can complain of the judgment. He was not entitled to receive any of the rents and profits which accrued prior to the time of his purchase of the property at the sheriff's sale (Code Civ. Proc. 707), and that was only two days before this action was commenced. Nor could he sue and recover for such rents and profits until they were collected and received by the defendant. It does not appear that any rents and profits from the property came into the hands of the receiver during those two days, or even during the two months and twelve days which elapsed between the time of his purchase and the entry of the judgment. Under the circumstances it would seem that the appellant took under the judgment all that he could possibly be entitled to.

The question discussed by the counsel, as to whether the filing of the *lis pendens* and the subsequent judgment awarding alimony created a lien on the property superior to the lien of the mortgage, does not arise in the case.

The judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

[No. 9563. Department Two.—August 22, 1885.]

L. W. DREYFUSS, RESPONDENT, v. E. O. TOMPKINS,
APPELLANT.

JUDGMENT—CLERICAL ERROR—AMENDMENT AFTER APPEAL.—A clerical error in the entry of a judgment, where it is shown by the record, may be corrected on motion at any time so as to make the entry correspond with the judgment rendered; and this may be done even after an appeal and affirmance of the judgment.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order amending the same.

The facts are stated in the opinion.

Cross & Simonds, for Appellant.

J. M. Walling, for Respondent, cited *Swain v. Nagle*, 19 Cal. 127; *Hegeler v. Henckell*, 27 Cal. 491; *Anderson v. Parker*, 6 Cal. 197; *Morrison v. Dapman*, 3 Cal. 255; *Freeman on Judgments*, § 70, 71; *De Castro v. Richardson*, 25 Cal. 49; *Atkins v. Sawyer*, 1 Pick. 351; 11 Am. Dec. 188.

BELCHER, C. C. — This was an action to recover the possession or value of certain personal property. The case was tried before a jury, and by the verdict it was found "that the plaintiff is the owner of the property described in the complaint and entitled to its return, or if a return thereof cannot be had, then for the sum of \$400, with interest thereon from June 16, 1882."

The judgment was entered up by the clerk on the 2d day of April, 1883, and after reciting the verdict added: "Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said L. W. Dreyfuss have and recover from said E. O. Tompkins costs and disbursements incurred in this action, amounting to the sum of \$95.50." The case was then appealed by the defendant to this court, where the judgment and order were affirmed. The remittitur was filed in the court below on the 28th day of February, 1884, and on the next day the plaintiff gave notice of a motion to amend the judgment by inserting after the words "Tompkins," and before "costs" the words "the property described in the complaint, or if a return thereof cannot be had, then for the sum of \$400 with legal interest thereon from June 16, 1882."

At the hearing of the motion counsel for plaintiff read the judgment as entered by the clerk and introduced no other evidence. The motion was granted and the judgment was amended accordingly. This appeal is from the order allowing the amendment.

It is well settled that clerical errors in a judgment, where they are shown by the record, may be corrected at any time so as to make the judgment entry correspond with the judgment rendered. (*Swain v. Naglee*, 19 Cal. 127; *Freeman on Judgments*, §§ 70, 71.) And this may be done even after an appeal and affirmance of the judgment. (*Rousset v. Boyle*, 45 Cal. 64.)

In this case the error complained of appeared on the face of the record, and it was the duty of the court to correct it on motion. The judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 11028. Department Two.—August 22, 1885.]

J. S. WIXSON, APPELLANT, v. THOMAS DEVINE,
RESPONDENT.

EVIDENCE—OPINION OF JUDGE.—A paper which purports to be the opinion of the judge in a former action between the same parties, but is not signed by the judge or authenticated in any way, is not admissible in evidence in connection with the judgment roll in that action.

FORMER ADJUDICATION—JUDGMENT RECORD.—A judicial record is not conclusive as to the truth of any allegations which were not material and traversable; but as to all those which were material and traversable, the judgment is conclusive between the same parties upon the same matter.

ID.—Upon comparison of the judgment roll in the former action with the pleadings in this, *held*, that the same identical question was involved and was finally determined in the former action, and should not again be litigated between the same parties.

ID.—PLEADING.—A former recovery by the plaintiff operates by way of estoppel on the defendant, and cannot properly be pleaded.

APPEAL from a judgment of the Superior Court of Sierra County, and from an order refusing a new trial.

The facts are stated in the opinion.

S. B. Davidson, and *M. Farley*, for Appellant.

The judgment in the former action was conclusive. (*Phelan v. Gardner*, 43 Cal. 307; *Kidd v. Laird*, 15 Cal. 163; 76 Am. Dec. 472; *McDonald v. Bear River*, 15 Cal. 145; *McLaughlin v. Kelly*, 22 Cal. 222; *Hamm v. Arnold*, 23 Cal. 375; *People v. Frank*, 28 Cal. 516; *Jackson v. Lodge*, 36 Cal. 37; *Caperton v. Schmidt*, 26 Cal. 493; *People v. Supervisors*, 27 Cal. 675; *Garwood v. Garwood*, 29 Cal. 521; *Gray v. Dougherty*, 25 Cal. 272; *Swink v. Thurston*, 47 Cal. 30; *Freeman on Judgments*, § 1.)

Van Clief & Wehe, for Respondent.

SEARLS, C. — The action is brought for the alleged wrongful

diversion of water, to the use of which plaintiff claimed the right, and for a perpetual injunction.

Cause tried by a jury; verdict for defendant. Plaintiff moved for a new trial which was denied, and the appeal is from final judgment and order overruling motion for new trial.

The record is wanting in clearness as to the precise time and point in the proceedings at which some of the objections were made and exceptions taken. It is not claimed for the two bills of exceptions set out in the statement on motion for new trial that they were served and settled as required by the Code, but that having been prepared they were included in the statement on the motion for a new trial, and it is as a part of such statement, and not as bills of exceptions, that they will be treated.

At the trial plaintiff offered in evidence the judgment roll in *Wixson v. Devine and Wife*, and a paper purporting to be the opinion of the judge who tried the cause of which the judgment roll is the record, but which opinion was not signed by the judge, or in any way authenticated so as to entitle it to be received as evidence.

The court admitted the judgment roll in evidence, and very properly excluded the so-called opinion of the judge. (*Wilson v. Wilson*, 64 Cal. 92; *McClory v. McClory*, 38 Cal. 575; *Hilden v. Jordan*, 28 Cal. 305.)

After the judgment roll in *Wixson v. Devine and Wife* was in evidence, the defendant under objection introduced testimony tending to show that the water restrained by plaintiff's dam and claimed by the latter, would, but for the dam, flow down a ravine, and by percolation or by subterranean channel find its way to a spring owned by the defendant, and claimed to be supplied by the water in question.

Plaintiff moved to strike out this testimony which was refused by the court, and the refusal is assigned as error.

The judgment roll shows that in June, 1883, J. S. Wixson, the plaintiff, brought suit against Thos. Devine, the defendant in the case, and Honora Devine his wife. The complaint avers plaintiff to be seized and possessed of a certain dam in Kentucky Ravine, together with the usufructory first right to the use of twenty-five inches of water of said ravine, for irrigating, farming, culinary, and domestic purposes, and that the said

waters, by means of a flume and ditch, are conducted to plaintiff's residence and there used, etc.

That on or about April 21, 1883, Honora Devine, one of the defendants, tore away and removed the plaintiff's said dam and diverted the said waters of said ravine from plaintiff's flume and ditch, and wholly prevented said twenty-five inches of water from flowing to plaintiff's residence, etc., whereby plaintiff was deprived of the use thereof, and his flume left to dry, etc., and claims damages in the sum of \$300.

The complaint further avers a repetition of the alleged wrongful acts, shows the necessity of the water to plaintiff, and contains apt allegations as to the insolvency of defendants and the propriety of a temporary injunction, and prays for damages and a perpetual injunction.

Defendants answered denying that plaintiff ever was seized or possessed of or entitled to the possession of the dam described in the complaint, or that he was entitled to, or possessed or seized of the usufructory first right to any water of said ravine for any purpose.

They admit plaintiff built a flume and ditch to divert said water from said ravine, but aver that he did so wrongfully, and had no right so to do.

They deny breaking a dam, but admit removing obstructions from this ravine, which prevented the natural and rightful flow of the waters as they had a right to do. They further deny all damage to plaintiff.

Defendants, after answering the allegations upon which a prayer for injunction is based, proceed to claim a prescriptive right to the water by an adverse use by themselves and grantors for twenty years.

As a further separate answer, the defendants claim ownership of all the water of Kentucky Ravine by virtue of a location and appropriation thereof in 1879, and of continuous use and possession since that date.

The cause was tried by the court without a jury, findings were waived, and on the 11th day of September, 1883, judgment was rendered in favor of plaintiff and against defendants therein for one dollar damages, costs taxed at \$81.60, and granting a perpetual injunction restraining defendants from interfer-

ing with plaintiff's dam at the head of his flume, or his flume or ditch, "or from interfering with or turning out any waters from Kentucky Ravine after said waters shall have reached plaintiff's dam, so long as the quantity shall not exceed twenty-five inches," etc.

The issue as to the right to have and use twenty-five inches of the water of Kentucky Ravine was clearly made by the pleadings, and as a result of the trial plaintiff had judgment.

The judgment was rendered upon the merits, was between the parties to this action, and related to the same subject-matter.

The right to use twenty-five inches of water from Kentucky Ravine was an element essential to a recovery by plaintiff in the former action. It was not a matter coming collaterally in question, or incidentally cognizable in the case, but formed the basis of his action. If such ownership or right to the water did not exist in plaintiff, he could not under the pleadings be entitled to recover.

It was the very point in issue and was determined in the cause. The dam described in the complaint, and which one of the defendants was charged with destroying, was but a means to an end; the water was the essential thing to be enjoyed, and the dam was but the instrumentality for securing it. Some stress seems to be laid upon the fact that the perpetual injunction forming a part of the final judgment only restrains defendants from interference with plaintiff's dam at the head of his flume, and with his flume and ditch, and "from interfering with or turning out any waters from Kentucky Ravine, after said waters shall have reached plaintiff's dam, so long as the quantity reaching said dam shall not exceed twenty-five inches," etc. The prayer of the complaint in that respect was that defendants be restrained from interfering with the dam or diverting the said waters therefrom, or from said flume or ditch.

The relief awarded follows substantially the prayer, and is as broad as, technically considered, plaintiff was entitled to. We should, however, look beyond the injunction to the general scope and effect of the judgment.

The paramount object of the action as gathered from the pleadings was to determine the right to twenty-five inches of water of Kentucky Ravine at plaintiff's dam or point of diver-

sion, and the judgment in his favor for one dollar in damages could not properly be entered until the right was determined in his favor.

If defendants were entitled to the water of Kentucky Ravine, the dam of plaintiff which prevented its flow was an obstacle to their enjoyment; was a nuisance which they had a right to abate, and in the answer they substantially admit removing it, and claim the right so to do.

There should be a limit to litigation. The same cause of action ought not to be brought twice to a final determination. Justice is promoted by having every cause once fairly and impartially tried; but once so tried justice is satisfied, and public tranquility demands that all litigation of that question and between those parties should be closed forever. If error has crept into the proceedings, provision is made for correcting such error by an application for a rehearing or by appeal. Failing in this, the best interests of society are promoted by treating the judgment as imparting absolute verity, and as conclusive between the parties and privies of every material question directly in issue and necessary to the determination. (Greenleaf on Evidence, § 522.)

A record is not conclusive as to the truth of any allegations which were not material and traversable, but as to things material and traversable it is conclusive and final.

And as to questions thus essential and thus determined, the judgment is as a plea in bar or as evidence conclusive between the same parties upon the same matter everywhere.

A comparison of the judgment roll in the former cause, with the pleadings in this, satisfies us that the same identical question, viz., the right of plaintiff to have and divert twenty-five inches of water from Kentucky Ravine at his dam on said ravine was a material question in issue and essential to the determination of each of said causes, that such question was finally determined in the former cause, and should not again be litigated between the same parties.

It was not necessary or proper for plaintiff to plead his former recovery. It operated by way of estoppel to the defense set up by the defendant, and as we have in our system of pleadings no replication to the answer, the estoppel could not properly be

pleaded. (*Clink v. Thurston*, 47 Cal. 30; *Flandreau v. Downey*, 23 Cal. 358.)

The record of the judgment introduced in evidence precludes the defendant from setting up any right to twenty-five inches of water in Kentucky Ravine, at the point of plaintiff's diversion or at any point above, so as to interfere with his enjoyment thereof at his dam and ditch.

We are of opinion therefore that the testimony offered by defendant and objected to by plaintiff, and which he afterward moved to strike out, was improper as tending to open anew a question previously determined by a final judgment between the same parties in a court of competent jurisdiction.

If, however, on another trial the plaintiff under his complaint shall claim a quantity of water in excess of twenty-five inches, measured as in said complaint prescribed, viz., under a four-inch pressure, as possibly under his pleading he may do, then and in that event the testimony offered will become competent in the determination of the right to such excess only.

The judgment and order should be reversed and a new trial ordered.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

Hearing in Bank denied.

[No. 9629. Department Two.—August 22, 1885.]

JEAN LEDU, APPELLANT, v. JIM YET WA,
RESPONDENT.

WATER RIGHTS—APPROPRIATION—STATUTE OF LIMITATIONS—EVIDENCE IN REBUTTAL.—In an action to restrain the diversion of water, the plaintiff having shown a prior appropriation of the water right by himself, which the defendant attempts to defeat by the plea of the Statute of Limitations, should be permitted to show in rebuttal that the defendant before any bar of the statute could have attached had acknowledged his claim and sought to become his lessee of the water right.

1D.—ADVERSE POSSESSION—INSTRUCTIONS.—Where the defendant has pleaded adverse possession in himself, it is error to instruct the jury "that if they believe that the plaintiff was the first to appropriate and use the waters in dispute, and that his appropriation and use thereof was prior to that of defendant and those under whom he claims adversely to the plaintiff, and that his possession was continuous, exclusive, and notorious, and that he has not parted with his right thereto or forfeited the same, they will find for the plaintiff," for the reason that the instruction would authorize the jury to find for the plaintiff without considering the defense of adverse possession.

APPEAL from a judgment of the Superior Court of Nevada County, and from an order refusing a new trial.

The action was brought to restrain the diversion of water by the defendant from the plaintiff's ditches, and for damages. The jury rendered a verdict for the defendant. The remaining facts are stated in the opinion.

J. I. Caldwell, for Appellant.

Cross & Simonds, for Respondent.

FOOTE, C. — This was a case tried by a jury. The plaintiff claimed ownership of a certain water right, the defendant denied such ownership, and set up title thereto in his lessor under the Statute of Limitations. The plaintiff after the defendant closed his testimony in chief, took the stand as a witness, and the following question was asked him:—

"State whether Jim Yet Wa, defendant, came to see you in May, 1882, and if so, for what purpose, and what took place then?"

The defendant's counsel objected on the ground that the question sought to bring out evidence not in rebuttal, but in chief, and irrelevant. The court sustained the objection. Plaintiff's counsel then stated that he expected to prove and offered to prove by the witness that the defendant had sought him in May, 1882, and offered to lease the water right in question for the season, and that the parties differed as to the price to be paid for it, and the lease was not made. This was objected to and the objection sustained. The plaintiff's wife was then introduced and sworn as a witness and a similar question asked her. This was objected to and the objection sustained by the court because it was not in rebuttal. To these rulings of the court counsel for plaintiff duly excepted.

We are of opinion that the court erred in not allowing the questions to be answered, and the evidence offered to go to the jury; the plaintiff had shown a prior appropriation of the water right in himself; the defendant sought to defeat it by holding up the shield of the Statute of Limitations; it was, therefore, competent for the plaintiff as a matter of evidence, in order to meet this defense, to show if he could, that the defendant, before any bar of the statute could have attached, had acknowledged the claim of the plaintiff, and sought to become his lessee for the water right.

The court refused to give the third instruction asked for by the plaintiff, which was in the following language:—

“That if the jury believe from the evidence that plaintiff Jean Ledu was the first, in point of time, to appropriate and use the waters of Humbug Creek now in dispute, and that plaintiff’s appropriation and use thereof was prior in time to that of defendant and those under whom he claims the same adversely to plaintiff, and that plaintiff has not parted with his right thereto or forfeited the same, the jury will find for the plaintiff”; and of its own motion gave the following:—

“That if the jury believe from the evidence that plaintiff Jean Ledu was the first, in point of time, to appropriate and use the waters of Humbug Creek now in dispute, and that plaintiff’s appropriation and use thereof was prior in time to that of defendant and those under whom he claims the same adversely to plaintiff and all other persons, and that his possession was continuous, exclusive, and notorious, and that plaintiff has not parted with his right thereto, or forfeited the same, the jury will find for plaintiff.”

The court did not err in refusing the instruction No. 3, asked by plaintiff. If given it would have taken from the jury the defense of adverse possession pleaded by defendant, upon which they should have passed in rendering a verdict for the plaintiff. In other words, the jury before it could find a verdict for the plaintiff must have decided the question of adverse possession against defendant. The instruction, if given, would have authorized the jury to find for the plaintiff without taking into consideration the defense of adverse possession. The instruction given by the court was erroneous for the same reason. The

jury were told that they might find a verdict if they chose without considering the defense above mentioned, set up by defendant.

We are, therefore, of opinion that the judgment and order denying a new trial should be reversed, and a new trial granted in accordance with the views herein expressed.

BELCHER, C. C., concurred.

SEARLS, C., did not participate in this decision.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for new trial.

[No. 9438. Department Two.—August 22, 1885.]

IN THE MATTER OF THE ESTATE OF JACOB I.
ROBERTS, DECEASED. NORA ROBERTS, APPELLANT, v.
CELIA MCKIMMON ET AL., RESPONDENTS.

ESTATE OF DECEASED PERSON—ADDITIONAL FAMILY ALLOWANCE.—Where the family allowance previously granted to the widow of a deceased person for a limited period has been exhausted, the estate being solvent, she is entitled to such further allowance as is necessary for her maintenance during the progress of the settlement of the estate.

APPEAL from an order of the Superior Court of Stanislaus County.

The facts are stated in the opinion.

T. P. Ryan, and *W. E. Turner*, for Appellant.

Geo. W. Schell, for Respondents.

FOOTE, C.—This is an appeal from an order denying the petition of a widow for a further family allowance; the sum of fifty dollars per month during six months had been previously allowed her.

There is no evidence in the record that the homestead affords any income to the widow, the small amount of personal property

set aside to her does not, and the former allowance made has long since become exhausted in supplying her necessary wants; she therefore appears before the court practically destitute and in poor health. The estate is still in process of settlement, and appears to be solvent.

This state of facts existing, we are of opinion that under section 1466 of the Code of Civil Procedure, the widow was entitled to have made her by the court below such reasonable allowance as was necessary for her maintenance during the progress of the settlement of her husband's estate. This right seems to have been denied the petitioner, and for that reason we are of opinion that the order of the court below should be reversed, and such allowance made to her as her necessities and the amount of the estate left undistributed in the hands of the executor will warrant.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the order is reversed.

[No. 20092. In Bank.—August 22, 1885.]

THE PEOPLE, RESPONDENT, v. JOHN S. PRICE,
APPELLANT.

CRIMINAL LAW—INSTRUCTIONS—FAILURE OF JURY TO HEAR.—The failure of the jury to hear instructions given them by the court is to be remedied by requesting the court to repeat the instructions at such a time and under such circumstances that they can be heard. It is not a ground for reversal of the judgment entered on the verdict.

Id.—DEGREES OF CRIME—GRAND LARCENY—VERDICT.—There are no degrees in the crime of grand larceny, and where an information charges the defendant with grand larceny in taking property from the person of another, a verdict of guilty is sufficient.

APPEAL from a judgment of the Superior Court of the county of San Joaquin, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

J. H. & J. E. Budd, for Appellant.

Attorney-General Marshall, for Respondent.

MORRISON, C. J.—The defendant was informed against in the Superior Court of San Joaquin County for the crime of grand larceny, committed by feloniously stealing from the person of another the sum of eleven dollars, and on the trial the jury rendered the following verdict:—

“We, the jury in the above-entitled cause, find the defendant guilty, and recommend him to the mercy of the court.”

A motion for a new trial was made in the case which was denied by the court, and the appeal is prosecuted from the judgment as well as the order denying the motion for a new trial.

There are two points made in the appeal, the first of which is that the jury did not hear the instructions given by the court. There is no evidence that the instructions were not heard by the jury excepting the affidavit of the attorney that he did not hear them, and therefore it by no means satisfactorily appears that the point is well taken in fact; but conceding that it is, it furnishes no reason in law for our interfering with the judgment. If it be true, as a matter of fact, that the jury did not hear the instructions of the court, because, as stated, there was so much noise in the court room at the time, the court should have been requested to repeat the instructions in such a manner and at such a time that they could have been heard by the jury. It would be unfair to the prosecution to allow the case to go to the jury under such circumstances, and then set aside the verdict, if adverse to the defendant for any such reason.

The other point is that the verdict is a nullity, inasmuch as it does not conform to section 1157 of the Penal Code, which provides that “whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty.”

The only question in the case is whether the crime with which the defendant was charged and of which he was convicted is distinguished into degrees. If it is, the verdict of the jury is clearly imperfect and bad under the foregoing section of the Penal Code.

By section 486 of the Penal Code “larceny is divided into

two degrees, the first of which is termed 'grand larceny'; the second 'petit larceny'; and by section 487, grand larceny is committed in either of the following cases:—

"1. When the property taken is of a value exceeding fifty dollars.

"2. When the property is taken from the person of another.

"3. When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, goat, sheep, or hog."

Section 488. "Larceny in other cases is petit larceny."

In the case we are now considering the defendant was charged with the crime of grand larceny inasmuch as he was accused of stealing money from the person of another.

It will be observed that the defendant was charged in the information with the crime of grand larceny, and it was further charged that the stolen goods were taken from the person of another. Now, there is under the law but one degree of grand larceny, whether the property stolen is of the value of fifty dollars or fifty thousand dollars, and every larceny committed by taking from the person of another is in its degree grand larceny. So that in either aspect of the case the charge against the defendant was the crime of grand larceny, which, as already remarked, is without degrees, and the verdict of the jury finding the defendant guilty was guilty as charged; that is to say, guilty of grand larceny.

In the case of the *People v. Whitely*, 64 Cal. 211, in which the defendant was charged with the crime of grand larceny, the verdict was "guilty as charged," and it was held sufficient. In our opinion the same rule is justly applicable to the case now before us. There is nothing doubtful or uncertain in the verdict.

Judgment and order affirmed.

ROSS, J., MCKINSTRY, J., MCKEE, J., THORNTON, J., and MYRICK, J., concurred.

[No. 9761. In Bank.—August 22, 1885.]

IN RE W. B. TREADWELL, DISBARMENT.

ATTORNEY AT LAW—DUTIES.—On a review of the evidence, *held*, that the respondent was guilty of a breach of his duty as an attorney in appropriating to his own use money collected by him for his client.

JD.—DISBARMENT—CRIMINAL OFFENSE NOT NECESSARY.—In exercising the power of disbarment, the court deals with the attorney only as an officer of the court, investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counsellor in the courts under the license which has been granted to him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished; and where an attorney has been found guilty in the practice of his profession of acts indicating moral depravity, he may be disbarred by the court without previous conviction of a criminal offense.

PROCEEDING for the disbarment of an attorney. The facts are stated in the opinion of the court.

G. E. Harpham, and J. Craig, for Petitioners, cited Sparr v. Vanderhayden, 9 Johns. 253; 6 Am. Dec. 275; *Delano's Case*, 58 N. H. 5; 42 Am. Rep. 555; *Austin's Case*, 5 Rawle, 191; 28 Am. Dec. 662; *Dicken's Case*, 67 Pa. St. 169; 5 Am. Rep. 420; *Ex parte Wall*, 107 U. S. 265; *In the Matter of ———, an Attorney*, 86 N. Y. 563; *Penobscot Bar v. Kimball*, 64 Me. 140; *Ex parte Bransall*, Coop. 829; *People v. Ford*, 54 Ill. 520; *Rice v. Commonwealth*, Mon. B. 484; *Mills' Case*, 1 Mann. 393; *In re Percy*, 36 N. Y. 651; *Bryant's Case*, 24 N. H. 155; *Burr's Case*, 1 Wheeler's Crim. Law, 503; *Leigh's Case*, 1 Munf. 481.

A. C. Adams, and W. C. Belcher, for Respondent, cited Code Civ. Proc. §§ 287–299; Ex parte Smith, 28 Ind. 47; *Redman v. State*, 28 Ind. 205.

McKEE, J.—This is an original proceeding to disbar an attorney at law for misconduct in office, in fraudulently appropriating to his own use moneys collected by him for his client.

The record shows that Carl Haneke had employed the attorney in a transaction which involved the sale and transfer of a tract of land in Yolo County, to one Isaac Quinn. Quinn gave his promissory note for the purchase money of the land, payable in the sum of \$2,450, and interest thereon from date of the note, payable quarterly in advance, to Haneke at the Bank of Cali-

foria, and secured its payment by a mortgage trust deed upon the land.

Note and deed were executed and delivered to Haneke on the 26th of March, 1881. Possession of the deed Haneke retained, and the note he deposited in the Bank of California for collection.

After finishing the transaction in that way, Haneke settled with the attorney and paid him for his legal services, but under the authority of Haneke, the attorney continued to act in collecting the quarterly interest as it became due upon the note, and any payments that were made of the principal sum.

Between the date of the note and the month of December, 1883, each quarterly interest of the note as it became due, and \$400 of the principal were collected and transmitted by the attorney to the bank, and were there properly applied to the payment of the note, and carried to the account of Haneke, who received and receipted for them. But in December, 1883, the attorney collected, in full, of the principal and interest then due, \$2,102.61, for which he gave his receipt in the following words:

"\$2,102.61.

WOODLAND, CAL., Dec. 12, 1883.

"Received of Isaac Quinn, twenty-one hundred and two 61-100 dollars, to be applied in payment of his note of March 26, 1881, to Carl Haneke.

W. B. TREADWELL."

This money he did not transmit to the bank as he had done his prior collections. Upon receiving the money he deposited it in his own name in the bank of Yolo, and used it as his own. Under oath he admits that within a few days after he had deposited the money he drew \$400 of it, and used it for his own purposes; that within a week or ten days he obtained from the bank a certificate of deposit for \$1,500 of it, payable to himself or order, on return of the certificate properly indorsed, and that the balance he kept and used.

It is claimed for him that he appropriated the money in that way by the authority and under instructions from a daughter of his client, at whose request he agreed to hold the money until an opportunity could be found for its investment in some way, so that it would yield, in the way of interest, a small monthly or quarterly income for the support of her father. And that when the daughter found an investment she wrote for the money and he sent her the \$1,500 certificate of deposit properly indorsed

by himself, and at the same time borrowed from her the balance of the money at the same rate of interest that Quinn had paid on his note.

This defense rests altogether upon his own testimony. His testimony, given in his own behalf, tended to show that in March, 1883, he received from the daughter of his client a letter in the following words:—

“SAN FRANCISCO, March 27, 1883.

“MR. W. B. TREADWELL—*Dear Sir*: During my father's recent dangerous illness, he deemed it advisable to arrange business matters to his satisfaction. He therefore indorsed and assigned the promissory note of the trust deed to me, and consequently I shall sign all receipts for interest or money sent as payment on note hereafter. The trustees have been duly notified of the change.

“Will you have the kindness to inform Mr. Quinn of the fact, and request him when he forwards interest again to have the check at the bank payable to me? Father is much better, but, being over eighty years of age, he does not feel able to have the cares of business thrust upon him. Hoping these few lines may find your family in good health, I remain, yours truly,

“HARRIET A. WISE,

“516 Filbert Street.”

He did not inform Mr. Quinn of the request contained in the letter, but he continued to make collections from him upon the note as usual. It is true, however, that the note was withdrawn from the bank by Haneke during his sickness, and after indorsement by him was again returned, after which Mrs. Wise drew from and receipted to the bank for all moneys which were collected and transmitted by the attorney for payment upon the note, prior to the month of December.

In connection with these facts the substance of the attorney's testimony, condensed to brevity, is this: “Before, or about the time I collected the principal and interest due on the note, I happened to meet Mrs. Wise at the Palace Hotel in San Francisco, and there informed her that Quinn was, or would be soon, ready to take up his note. This troubled her, because, as she expressed it, her father was old, very feeble, and childish, and looked to the regular payment of the interest on the note as

absolutely necessary to his comfort in his declining years, and she thought it advisable that knowledge of the payment of the note should be kept from him; therefore she 'proposed' to me, that, instead of transmitting the money to the bank, as usual, to be applied to the payment of the note, I should retain it in my possession until she or I could find some opportunity to invest it so as to make it interest-bearing; and in the mean time I could use the money to pay interest at the bank as usual, so as to have it appear that the matter was going all right."

After this alleged interview the attorney admits he never saw Mrs. Wise again. And the fact is, that before it became publicly known that the money had been collected, Mrs. Wise fell sick and was taken to the German Hospital where she died. But the attorney claims that, before her death, and soon after he had deposited the money in the Bank of Yolo, he began a correspondence with her as to the investment of the money, in one of the letters of which he sent to her address in San Francisco, by mail, the certificate of deposit of \$1,500, by him properly indorsed, and at the same time wrote to her as follows: "As to the balance of the money, I will, if satisfactory, use it myself, and pay you the same rate of interest until you can use it otherwise, or I can find some other investment." "In answer to that letter she wrote to me acknowledging the receipt of the certificate, and at the same time asked me to send her \$200 of the balance in my hands, if I could conveniently spare it," urging me at the same time to keep the matter open and pay the next instalment of interest at the bank. To that letter I replied "that it was not convenient to send the \$200, but I would let her know in a day or two whether I could do so, and that I would attend to the payment of interest."

"Q. — You made an investment of the rest for her?

"A. — Yes, sir.

"Q. — Of \$600?

"A. — Yes, sir. . . . I had borrowed it myself, and had so stated in my letter; and she had agreed to it — it was agreed to by her. I was to pay the same rate of interest that Mr. Quinn had been paying until I should give it up or make some other investment."

All the letters of this asserted correspondence, says the attorney, are lost, and he testified to their contents from his recol-

lection. There was, of course, no explanation or contradictions of his statements by Mrs. Wise, she being dead. Upon his own testimony, therefore, as to the authority from and correspondence with Mrs. Wise, rests his exculpation of himself, and we regret to find that his attempted exculpation is not founded in fact.

As fact, the attorney admits the use of the money for his own purposes, except the sum of \$1,500, which he claims to have sent to Mrs. Wise. But it is a fact that Mrs. Wise never received the certificate of deposit, nor had it cashed by any one for her. On the contrary, the evidence proves beyond a reasonable doubt that on the day after the attorney obtained the certificate from the Bank of Yolo he was in San Francisco, and on the next day between the hours of 12 M. and 1 P. M., he, in person, presented the certificate to the Bank of California, properly indorsed by him, and received for it a cash payment and a certificate of deposit for \$1,200, payable to himself, upon his indorsement, on which he soon afterwards received the money from the Bank of Woodland and used it. It follows that Mrs. Wise never received from the attorney any of the \$2,102 collected by him. In fact, the non-receipt of any portion of the money increased her sorrows and served to embitter her last days. The attorney therefore held back the entire sum which he collected, and used it for his own purposes, under circumstances which make his conduct inexcusable and unprofessional.

The attorney admitted "that it was wrong to use the money, but he supposed that he could replace it whenever they wanted it, knowing that they wanted it kept out at interest." His good intentions, however, neither excuse nor mitigate his official conduct. As a lawyer, he knew that he could not professionally enter into a secret arrangement to conceal from his client a knowledge of the collection of the money, and that even under the color of such an arrangement, assuming that such had been made, it was not allowable for him to deal with the money in such a way as to injuriously involve the rights of others standing in such a relation to it as to be affected by an unauthorized and unlawful use of it, nor to convert it to his own use. He knew that it was a duty which he owed to himself, his client, and the man from whom he had collected the money, to pay it

over as soon as he received it, by transmitting it to the bank where the note was deposited, and where it would be properly applied to the credit of the note, and turned over to the account of the owner. In failing to discharge that duty, and in converting the money to his own use, he violated his oath of office and abused his trust.

As to the power of the court to strike the name of an attorney from the roll of attorneys and counsellors of the court for such official misconduct there is no question. Section 287 of the Code of Civil Procedure provides: "An attorney and counsellor may be removed or suspended by the Supreme Court, . . . for either of the following causes arising after his admission to practice:—

"1. His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction is conclusive evidence.

"2. . . . Any violation of the oath taken by him or of his duties as such attorney and counsellor."

In the exercise of this power the court deals with the attorney only as an officer of the court in investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counsellor in the courts under the license which has been granted to him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished. That can only be done in a criminal court of competent jurisdiction by due process of criminal law. Previous conviction of a crime is not necessary to a proceeding to disbar an attorney. If an attorney be found by a court guilty of acts indicating professional moral depravity, the court can, without previous conviction of a criminal offense, prevent the repetition of such official acts, by taking away the license under which they have been committed. This it will do not only in the interest of justice and of the public, but of the legal profession, which, like the court itself, ought to be free from all suspicion. "It is indispensable that an attorney be trustworthy. And he is not trustworthy if he is capable of improperly applying to his own use his client's money, whether he intends to return it or not." (*Delano's Case*, 58 N. H. 5.)

It is ordered that the name of the attorney be stricken from the roll of attorneys and counsellors of the court, and that he be precluded from practicing as such attorney and counsellor in any of the courts of the State.

MORRISON, C. J., ROSS, J., MYRICK, J., THORNTON, J., and MCKINSTRY, J., concurred.

[No. 20030. In Bank.—August 22, 1885.]

EX PARTE B. H. LICHTENSTEIN ON HABEAS
CORPUS.

CONSTITUTIONAL LAW—PAWNBROKERS—ACT LIMITING RATE OF INTEREST.—The Act of March 7, 1881, amending section 340 of the Penal Code, and making it a misdemeanor for a pawnbroker to charge or receive interest at the rate of more than two per cent per month, is not repugnant to the provision of the Constitution which prohibits the passing of special laws regulating the rate of interest on money.

APPLICATION for a writ of habeas corpus. The facts are stated in the opinion of the court.

Chas. B. Darwin, for Petitioner.

J. D. & D. T. Sullivan, *Contra*.

MORRISON, C. J.—The petition for a writ of habeas corpus in this case sets forth “that a complaint was filed against the petitioner in the Police Court of the city and county of San Francisco, charging that he was engaged in and was conducting the business of a pawnbroker in said city, and as such received from a person therein named one gold watch as a pledge in consideration of a loan of thirty dollars, and did then and there unlawfully and wilfully charge on said loan a rate of interest in excess of two per cent per month, to wit, interest at the rate of four per cent per month, and thereupon the petitioner was brought before said Police Court, was tried and convicted, and sentenced on said charge. Defendant thereupon appealed from said judgment of conviction to the Superior Court of the city and county of San Francisco, where said judgment was duly

affirmed." It is claimed that the petitioner is unlawfully restrained of his liberty, because the act under which he was prosecuted is unconstitutional and void. The following is the law for a violation of which petitioner was convicted:—

"Section 340 of the Penal Code is hereby amended so as to read as follows:—

"Every pawnbroker who charges or receives interest at the rate of more than two per cent per month, or who, by charging commissions, discount, storage or other charge, or by compounding, increases or attempts to increase such interest is guilty of a misdemeanor."

Section 340 of the Penal Code, which was passed before and was in force when the new Constitution went into effect, prohibited pawnbrokers from receiving a greater rate of interest on loans than four per cent per month. The contention is that the last act on this subject, and the one under which the prosecution in this case was had, and which was approved March 7, 1881, is in violation of certain provisions of article iv., section 25, of the Constitution. The following are the provisions said to be violated:—

"The legislature shall not pass local or special laws in any of the following enumerated cases; that is to say, second, for the punishment of crimes or misdemeanors.

"Twenty-third, regulating the rate of interest on money."

This case really turns upon the second prohibition above referred to, because if the legislature had the right to prohibit pawnbrokers from charging a larger rate of interest than two per cent per month on loans made by them, it had a right to punish parties who violated the law; otherwise it would be a law without a sanction to enforce it.

By section 2 of article i. of the old Constitution it was provided that "all laws of a general nature shall have a uniform operation," and by the Act of 1861, referred to above, the rate of interest which pawnbrokers were allowed to charge was regulated by a law applicable solely to that class of money-lenders. In the case of *Jackson v. Shawl*, 29 Cal. 267, the constitutionality of that law was attacked on the ground that it was a special law, not uniform in its operation, but the court upheld it. The court there says: "The constitutional objection

which is made to this act of the legislature has been settled adversely to the views of the defendant by several cases (naming them), and it is only necessary for us to say we are satisfied with the general doctrine of these cases respecting the clause of the Constitution in question, and therefore hold the objection made to the statute to be invalid."

In the case of *Ex parte Koser*, 60 Cal. 177, involving the constitutionality of the so-called Sunday law, one objection made to the law was that it was in violation of section 25, article ii., of the present Constitution, inasmuch as it was a special law for the punishment of crimes and misdemeanors, which the legislature was prohibited from passing. The law was sustained, and MR. JUSTICE THORNTON, in delivering the main opinion of the court says:—

"Certainly the legislature is intrusted with an enlarged discretion to determine what shall be punished criminally, and what shall not be, to fix upon what shall be put in the class of *mala prohibita*, and what shall not be included. It is consistent with this view to conclude and hold that such a law is a general one, uniform in its operation, and that by it no privilege or immunity is granted so as to bring it in conflict with the clause of the Constitution above referred to."

Accepting the foregoing as a correct definition of a general law, we think the act in question may be sustained. It applies to all persons in this State engaged in the business of licensed pawnbrokers, and makes all persons engaged in that business amenable to its provisions. And if we look into the reason of the law it is not without good and valid reasons to support it. It is well known that persons frequenting the offices of pawnbrokers are generally the reckless and needy and improvident, who require the protection of the law. To no other class of money-lenders do the same reasons apply. Men driven by the necessities of their situation resort to the pawnbroker, and pledge any and all articles in their possession in order to raise money, and they are not particular about the rate of interest charged them. The pawnbroker also does a business peculiar to himself. He *always* requires a deposit as security for the amounts loaned, which are usually small, and in that respect at least, his is a business not carried on by any other

person in the State. Pawnbrokers are not allowed to do a certain act because the legislature in its wisdom deemed it injurious and harmful to the community to permit them to do the prohibited act, but the like necessity for a rule of prohibition did not, in the opinion of the law-making power, apply to any other class of persons in the community. It is only in cases where an act of the legislature clearly violates a provision of the Constitution that a court is justified in setting it aside, and we cannot say that the act in question is such.

Writ dismissed and petitioner remanded.

MYRICK, J., THORNTON, J., and MCKINSTRY, J., concurred.

[No. 8691. Department Two.—August 24, 1885.]

LEON DE LAURENCEL ET AL., APPELLANTS, v. ROMAIN
CAMILLE DE BOOM, RESPONDENT.

ESTATE OF DECEASED PERSON—TRUST—INTERPRETATION—DISTRIBUTIVE SHARE.—A testator left all his property in trust to be distributed among his heirs, the children of a deceased sister and those of a deceased brother. *Held*, that under the provisions of the trust the children were to take the property in equal shares, and not by way of representation.

APPEAL from an order of the Superior Court of the city and county of San Francisco refusing a new trial.

The action was brought to obtain a distribution of the trust property. The remaining facts are stated in the opinion of the court.

Edward J. Pringle, for Appellants, cited *Estate of Apple*, 66 Cal. 432.

Timothy J. Lyons, for Respondent, cited 1 Perry on Trusts, § 257; Lewin on Trusts, pp. 706, 707; *Blackler v. Webb*, 2 P. Wms. 383; *Campbell v. Wiggins*, 1 Rice's Eq. 10; *Hill v. Bowers*, 120 Mass. 135; *Ex parte Verplanck*, 91 N. Y. 439, 445.

MYRICK, J. — Jean Corneille De Boom was a naturalized citizen of the United States. He died in 1870, domiciled in

France. His next of kin him surviving were three De Laurencels, children of a deceased sister, and five De Booms, children of a deceased brother. He left some property in France, but the bulk of his property was in this State, consisting of real and personal estate. By the will of the deceased (which has been probated and the property distributed accordingly) all his property was devised to his nephew Romain Camille De Boom, in trust for certain specified purposes, with a direction that after the expiration of ten years the same was to go to the De Booms and De Laurencels. In what proportion is the question before us? It is contended on behalf of the De Laurencels that the nephews and nieces are to take as by right of representation according to the law of France, giving to them one half the property, the other half going to the De Booms; while it is contended on behalf of the De Booms that the property is to be divided in equal proportions among all. The court below decreed in accordance with the latter proposition.

The instructions left by the deceased for the guidance of the trustee contain the following clause: "After ten years of administration, and after having settled with the greater portion of the creditors, you will raise money enough to pay the balance in full. At that time you shall also disclose to all my heirs, the De Booms as well as the Laurencels, the state of my succession, and the manner in which you intend, either immediately or later, to place them in possession, each for what comes to him; and if you do not elect a distribution of my succession at the expiration of ten years after my death, after a settlement with the creditors, you will account to and pay over to each of my heirs the revenues as you receive them. Confiding in your fidelity, I leave it to you to distribute either the whole or a part of the capital of my estate among my heirs, or the revenues only during twenty years from the date of my death."

In cases of intestacy there can be no doubt of the proposition as to real property that the law of its situation will control. (Story on Conflict of Laws, § 474, n.) In general, it is held as to personal property that the law of the domicile will control, unless there be a local law directing otherwise. But the deceased did not die intestate; he left a will with instructions, under which will and instructions the trustee holds the property.

We must, therefore, look at the will and instructions, holding them, as it were, by the four corners, to see if we can ascertain his intentions. He made "all my heirs, the De Booms as well as the Laurencels," the recipients of the proposed bounty. We are of opinion that when the testator said his property was to go to all his heirs, the De Booms as well as the Laurencels, he did not mean in the proportions directed by the law of his domicil, nor according to the law of succession in this State in cases of intestacy, but he said, in effect, "the De Booms and Laurencels are my heirs, and I wish them to have my bounty." The words "all my heirs" are not to be taken in this case solely as meaning those who take in case of intestacy, but are to be considered in their relation to the words "the De Booms as well as the Laurencels." The testator did not mean that all persons named De Boom or Laurencel should take; but that the persons of either name who stood in an inheritable relation to him should take. Both families did stand in that relation, and so standing and being thus grouped the principle comes in that where a class is named as devisees, all of that class shall share, and shall share equally. In this view, we think the language used by the testator is clear, and expressed the intention that the relatives named in the record should take equally.

MORRISON, C. J., and THORNTON, J., concurred.

[Nos. 9888; 11059. Department One.—August 25, 1885.]

WILLIAM GREEHN ET AL., RESPONDENTS, v. P. N.
MARKER ET AL. P. N. MARKER, APPELLANT.

MOTION FOR NEW TRIAL—DISMISSING PROCEEDINGS—ORDER REFUSING TO SET ASIDE DISMISSAL—EX PARTE APPLICATION.—An order of the court dismissing the proceedings on a motion for a new trial can not be set aside on an *ex parte* application.

APPEAL from a judgment of the Superior Court of Lassen County, and from an order refusing to set aside an order dismissing proceedings for a new trial.

The facts are stated in the opinion.

J. F. Alexander, and *W. A. Anderson*, for Appellant.

E. V. Spencer, for Respondents.

SEARLS, C. — This is an action by plaintiffs as copartners to recover for goods, wares, and merchandise, sold and delivered to defendants.

Plaintiffs had judgment.

Defendant Marker moved for a new trial, and on the 26th day of May, 1884, filed with the clerk a statement on such motion.

The statement thus filed was not settled, allowed, or certified, and on the 4th day of October, 1884, the court, on motion of plaintiffs, dismissed the proceedings on motion for new trial, on the ground that said proceedings had not been prosecuted with due diligence as required by law. Defendant Marker, on the 3d day of December, 1884, moved the court to set aside the order of October 4, 1884, dismissing his proceedings for new trial, which motion was denied. Two appeals are prosecuted in the case, one from the final judgment, based on the judgment roll alone, and the other from the order of December 3d, denying the motion of defendants to vacate and set aside the order of the court of October 4, 1884, dismissing the proceedings for new trial. This last appeal was taken January 22, 1885, and by stipulation of counsel the two appeals are consolidated and submitted as one case. No notice was given to counsel for plaintiffs of the motion to set aside the order of October 4, 1884, and one of the grounds specified in the order of refusal appealed from is the want of such notice.

Under such circumstances the action of the court below was eminently proper, and any other course would have been erroneous.

Upon the question, whether or not the order was an appealable one, we express no opinion.

There is no error apparent in the judgment roll.

We are therefore of opinion that the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9746. Department Two.—August 25, 1885.]

LUCY GILMORE, RESPONDENT, v. AMERICAN CENTRAL INSURANCE COMPANY OF ST. LOUIS, APPELLANT.

PRACTICE—STIPULATION TO ABIDE DETERMINATION OF ANOTHER CAUSE—FINAL JUDGMENT.—Where two causes alike in every material respect, and having the same attorneys on both sides, are pending in the same court, a stipulation that one of them shall abide the determination of the other, and that final judgment may be entered in accordance with such determination, does not lose its effect for the reason that a judgment rendered in the other case is reversed on the ground of error in overruling a demurrer to the complaint, the pleadings in that case being thereupon amended without making any substantial change in the issues and final judgment obtained on the merits.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing to vacate the same.

The facts are stated in the opinion.

Gray & Haven, T. C. Van Ness, and W. P. Gardiner, for Appellant.

Wells, Van Dyke & Lee, for Respondent.

BELCHER, C. C.—This is the second appeal in this case. Upon the first appeal it was held that the judgment was prematurely entered, and it was therefore reversed.

That judgment was entered upon the stipulation which is recited in the opinion of the court (65 Cal. 63), and the judgment now appealed from was entered upon the same stipulation.

It is now claimed that the stipulation had become *functus officio* and did not authorize the entry.

It appears that the *Lycoming Case* referred to in the stipulation, and this case, had been commenced upon fire insurance policies which were issued by the defendant companies upon the same property and were substantially alike. Demurrers had been interposed to the complaints and overruled and answers

filed. The cases were called for trial on the same day, and thereupon "both parties consenting in open court that the issues in this cause are identical with those of the other action," the stipulation was made and entered in the minutes of the court.

By the stipulation it was agreed that "all proceedings herein shall be stayed until final judgment and decision" in the *Lycoming Case*, "and in case of an appeal in said last-named action then such proceedings are stayed until the final determination of such appeal; and upon such final determination, judgment, and decision" of the *Lycoming Case*, "either party, without notice, shall and may cause to be entered a judgment in this action corresponding to and like the said final judgment."

The *Lycoming Case* was then tried and judgment rendered in favor of the plaintiff.

An appeal from that judgment was taken, and it was reversed upon the ground that the demurrer to the complaint should have been sustained, because a copy of the policy being attached to the complaint, the application therefor which was referred to and made a part of the policy was neither set forth in the complaint nor its contents alleged. (*Gilmore v. Lycoming Fire Insurance Company*, 55 Cal. 123.)

On the going down of the remittitur the plaintiff amended her complaint by attaching thereto a copy of her application for the policy. The defendant amended its answer, but no substantial change was made in the issues to be tried. The case was then tried and judgment was again rendered in favor of the plaintiff. After that judgment had become final the defendant moved the court to change its rulings upon the demurrer in this case, and the motion was set down for hearing at a future day. Before the day arrived the plaintiff without notice moved the court for judgment in pursuance of the stipulation, and her motion was granted. The appeal here is from that judgment and an order refusing to set it aside.

We see nothing in this of which the defendant can be heard to complain.

When the stipulation was made the cases were in every material respect alike. They were based upon like policies, involved the same amount of money, and had the same attorneys both for plaintiff and defendant.

That being so, it was not thought necessary or advisable to go to the expense of trying both of them, as a final judgment in one would determine the real merits of the other. It was, however, contemplated, that an appeal might be taken in the case tried, and that for the possible error in overruling the demurrer, or for other errors afterwards committed, the judgment might be reversed. It must also have been contemplated that in case of a reversal amendments might be made and a new trial had. The stipulation in effect provided that while all this was being done in the *Lycoming Case*, and until a final judgment should be reached in that case, this case should remain in abeyance; but that when the judgment should become final in that case, then a like judgment might be entered without notice in this case.

The judgment appealed from in the *Lycoming Case* was not final within the meaning of the stipulation, and the stipulation did not become *functus officio* when that judgment was reversed. Nor was it necessary to amend the complaint in this case as it was amended in that. The amendment was but a means to obtain a trial upon the merits, and the judgment thereafter obtained became final only in the sense of the stipulation, when the time to move for a new trial and to appeal therefrom had elapsed and no motion was made and no appeal taken: Then the plaintiff became entitled to the judgment which she took in this case.

In our opinion the judgment and order should be affirmed.

FOOTE, C., and SEARLS, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9534. Department One.—August 26, 1885.]

WILLIAM COOK, RESPONDENT, v. THE LION FIRE
INSURANCE COMPANY, APPELLANT.

FIRE INSURANCE—STATEMENT IN PROOFS OF LOSS—FALSE REPRESENTATIONS BY INSURER.—In an action on a fire insurance policy, the assured is not bound by a statement made by him in his proofs of loss, if he was induced to make such statement by the false representations of an agent of the insurer.

BILL OF SALE—WHEN A MORTGAGE—PRE-EXISTING DEBT—CONSIDERATION—INTENTION.—In determining whether or not a bill of sale, given in consideration of a pre-existing debt, is a mortgage, the question to be settled is whether the intention of the parties was to cancel the debt or to secure its payment; and this is a question of fact, the determination of which depends upon the negotiations had at the time, and the subsequent acts of the parties.

ID.—EVIDENCE.—On a review of the evidence, *held*, that the bill of sale in question was not intended as a mortgage or pledge.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

T. C. Van Ness, for Appellant. That the bill of sale was intended as a mere security is shown by all the circumstances attending the transaction. (Civ. Code, §§ 2888, 2987; *Jones on Chattel Mortgages*, §§ 23, 24; *Poindexter v. McCannon*, 1 Dev. Eq. 373; *Barnes v. Holcomb*, 12 Smedes & M. 306; *Locke v. Palmer*, 26 Ala. 312; *Scott v. Henry*, 13 Ark. 112; *Folsom v. Fowler*, 15 Ark. 280; *Desloge v. Ranger*, 7 Mo. 327; *Fowler v. Stoneum*, 11 Tex. 478; *Cooper v. Brock*, 41 Mich. 488; *Sewell v. Henry*, 9 Ala. 24; *Ross v. Ross*, 21 Ala. 322; *Perkins v. Drye*, 3 Dana, 170; *Weathersly v. Weathersly*, 40 Miss. 462; *Gibson v. Eller*, 13 Ind. 124; *Clark v. Finlon*, 90 Ill. 245; *Knox v. Black*, 1 Marsh. A. K. 298; *Russell v. Southard*, 12 How. 139; *Omaha Book Co. v. Sutherland*, 10 Neb. 334; *Hodges v. Tenn. M. & F. Ins. Co.*, 8 N. Y. 416; *Sears v. Dixon*, 33 Cal. 326; *Montgomery v. Spect*, 55 Cal. 352.)

A. P. Catlin, for Respondent. The plaintiff being induced to make the statement in his proofs of loss by the misrepresentations of the adjuster, is not bound by it. (*Bridgewater Iron Co. v. Enterprise Ins. Co.* 16 Rep. 48.)

FOOTE, C.—This is an action upon a fire insurance policy. The evidence shows that just before the policy was issued, Cook, the plaintiff, had a debtor, one Cardwell; that Cardwell wanted to get some more money from Cook, and offered to sell him a certain 1,500 cords of wood in payment of the money which had been, and was about to be procured by him; that as a part of this negotiation it was understood that Cook was to insure the wood to be transferred to him by Cardwell, and for that purpose

these two visited one Meredith, who was the agent of the Liverpool, London & Globe Insurance Company, resident at Folsom. Upon stating to this agent the nature of the proposed sale, Cook was advised by him to take a bill of sale from Cardwell of the wood, and further, to take possession of it, as the parties Cook and Cardwell seemed desirous that the transaction should be a sale and not a mortgage. Accordingly, a bill of sale was drawn by the agent, and signed by Cardwell, and a formal delivery of possession was taken by Cook, and the wood remained at the spot where he took such possession, on the bank of the American River, and he was never after that divested of its possession until it was burned. After this bill of sale and delivery of possession took place, and the agent Meredith was by Cook and Cardwell put in possession of a full knowledge of the title of Cook to the wood and all the facts leading up to and surrounding this sale and delivery, he made out an application addressed to the Liverpool, London & Globe Company for an insurance policy on this property in the sum of \$4,000, and Cook signed the same. This application set out what was the understanding of the agent, Cook, and Cardwell, at that time, viz., that Cook was the sole owner of the property. It was forwarded to San Francisco, and in due course of mail was received by the Liverpool, London & Globe Company's agent there. The risk was not accepted by that company, but it submitted the application to the Lion Company, without any knowledge of it on the part of Cook, and upon this application, thus submitted, the Lion Company issued its policy to Cook, and it was forwarded through the L. L. & G. Co. to Meredith, the latter company's agent at Folsom; Cook at that time was absent, and Meredith informed Cardwell of the arrival of the policy, and that the premium on it ought to be paid; thereupon Cardwell paid to Meredith for Cook the amount of the premium for the Lion Company, which company received it. This wood was after that time burned, with 500 other cords of wood which Cook had bought from Cardwell and which was piled near that first purchased. An adjuster was sent up to Folsom after the wood was destroyed by fire, to look into the matter. Neither he nor his company at this time seem to have claimed that the policy thus issued to Cook was void. Their claim appears to

have been that he had only a lien upon the wood for the money he had paid Cardwell for it, viz., the sum of \$2,290; that he was not the sole owner of the wood, and that his insurable interest amounted in no event to more than the sum above stated. It also appeared that after the insurance policy was issued, Cook took a second bill of sale from Cardwell, including the 1,500 cords of wood first sold and delivered, and the 500 last sold, and that at that time \$550 of the \$2,290 was paid Cardwell; it also appears in evidence that at the time of the first sale it was agreed in writing between Cook and Cardwell that the former would sell to the latter the 1,500 cords of wood if by a certain date Cardwell paid Cook the sum of \$1,800.

The whole contract in writing between Cook and Cardwell comprised in both the bill of sale and the agreement cotemporaneous with it, was a sale with the privilege to repurchase reserved to the vendor. It was simply in effect this, that Cardwell, upon paying to Cook within a certain time, and that but a brief one, a certain sum of money, might repurchase the property, or what is the same thing, divest title from Cook which had by the sale vested in him. *Haynie v. Robertson*, 58 Ala. 40, and cases there cited; *Hickman v. Cantrell*, 9 Yerg. 172; *Magee v. Catching*, 33 Miss. 673, 693.) It was not a mortgage or a pledge. (Jones on Chattel Mortgages, § 26.) In this case the transaction was based, it is true, upon a previously existing debt, and the question to be settled is whether the intention of the parties was to cancel that debt or secure it, and this again is a question of fact to be determined by the negotiations had at the time and the subsequent acts of the parties. (Jones on Mortgages, § 326.) Here a debt was paid and no claim afterwards made for it. The party purchasing expressly declared that he would not take a mortgage, but must have a sale of the property to himself. A bill of sale was written and signed, and the property was delivered to the vendee by the seller and taken possession of by him, and no acts of ownership have since been exercised by the vendor over it, he having the privilege conceded to him that if he would pay at a certain time a certain price for the property he might purchase it, and that was the full extent of his rights and the title to the wood vested in Cook. (Jones on Mortgages, § 326; *Hooper v. Bailey*, 28 Miss. 328.) So that when Cook signed the applica-

tion which was made out by Meredith, and described himself as the sole owner of the wood, he described his title truthfully, and committed no breach of warranty as to the policy issued by the Lion Insurance Company. The plaintiff did nothing, so far as the application was concerned, to forfeit the policy, even conceding that it was an application which the Lion Company might justly consider as made to itself.

But it is said Cook cannot recover from the Lion Company anything more than the amount claimed in the proof of loss, viz., the sum of \$2,290. This cannot be so. It sufficiently appears, although on this point the evidence is conflicting, that the insurance adjuster did not deal fairly with Cook in getting him to sign and swear to the proof of loss, and we do not think the latter should be bound by any such statement. When an adjuster faithfully and fairly obtains an affidavit of loss from one claiming against his company, it is to be commended; but when the contrary appears, as in this case, the party thus entrapped should not be bound by it to his prejudice.

The Lion Company was not deceived by Cook in any way; he stated nothing that affects his rights untruthfully to it or its agents, either verbally or in writing. He is shown to have been the sole owner of the property insured, to have suffered the full amount of the loss as such owner, and through no fault of his.

As to the point made that the question asked Meredith "what he knew of the transaction," as between Cook and Cardwell was immaterial, we are of the opinion that it and the evidence he gave in answer thereto were admissible because it was proper that all the negotiations had at the time the bill of sale was made, and also the subsequent acts of the parties in relation thereto, should be considered in determining the question of fact as to whether the intention of the parties was to cancel the debt or secure it. (Jones on Mortgages, § 326.)

One of the main facts to be determined by the court who tried the case, a jury being waived, was whether the bill of sale represented an absolute sale of the wood or was executed for security; this was a question to be decided by that tribunal on a preponderance of evidence as if before a jury. (*Perkins v. Eckert*, 55 Cal. 400-404.) The court having determined this question in the affirmative, and a conflict of evidence on

the point appearing to exist, the judgment should not be reversed.

Upon the whole case we are of opinion that the judgment and order denying a new trial should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in Bank denied.

[No. 11026. Department Two.—August 26, 1885.]

D. R. CLANTON, RESPONDENT, v. W. M. COWARD,
APPELLANT.

PRACTICE—VERDICT—CONFLICT OF EVIDENCE.—Where there is a substantial conflict in the evidence, a verdict will not be disturbed on the ground of insufficiency of the evidence to sustain it.

ID.—POWER TO REMIT EXCESS.—The court may allow the plaintiff to remit from a verdict an excess over and above the amount demanded in the complaint, and to take judgment accordingly.

SURETYSHIP—REIMBURSEMENT—PLEADING.—In an action by a surety on a promissory note against his principal for reimbursement, the suretyship not appearing on the face of the note, a complaint which avers that the plaintiff signed the note as a surety only, and for the accommodation of the defendant, need not allege a request from the defendant to the plaintiff to pay the same.

APPEAL—AFFIDAVIT.—An affidavit which is not embodied in any statement or bill of exceptions cannot be considered on appeal.

APPEAL from a judgment of the Superior Court of the county of Yolo, and from an order refusing a new trial and certain other orders.

The facts are stated in the opinion.

R. Clark, and Hudson Grant, for Appellant.

The verdict cannot be cured by remitting the excess. (*Koeltz v. Bleekman*, 46 Mo. 321; *Dougherty v. Haggin*, 63 Cal. 522.) The complaint should allege a request from the defendant to the plaintiff to pay the note. (*Swan's Pleadings*, p. 174; *Farron v. Sherwood*, 17 N. Y. 227; *Byrnie v. Wood*, 24 N. Y. 607; *Irwin*

v. *Shultz*, 46 Pa. St. 174; 2 Greenleaf on Evidence, §§ 107, 113, 114; *Victors v. Davis*, 1 Dowl. & L. 894; 1 Parsons on Contracts, 469.)

Harding & Goin, for Respondent.

No allegation of request was necessary. (1 Parsons on Contracts, 6th ed. 471, 474, *570, n.f.; *Green v. Palmer*, 15 Cal. 414, 415; 76 Am. Dec. 492; *Levinson v. Schwartz*, 22 Cal. 229; *Wilkins v. Stidger*, 22 Cal. 231, 236.) The court ruled correctly in permitting the plaintiff to remit the excess. (*Gillespie v. Jones*, 47 Cal. 264; *People v. Hagar*, 52 Cal. 183, 184, and other cases cited in the opinion of the court.)

SEARLS, C. — Action on a promissory note made by plaintiff and defendant. Plaintiff had verdict and judgment.

The promissory note in question was joint and several in form, and made by plaintiff and defendant to one A. D. Porter for \$4,500 and interest, which sum of money was borrowed from Porter and used in the purchase of a marble yard, the deed for which was taken in the name of defendant.

Plaintiff and defendant were engaged as partners in buying and selling real estate in Yolo County, the former furnishing capital, and the latter rendering services in the business of the firm, keeping or causing to be kept the books of account of the partnership transactions.

The theory of plaintiff is that the purchase of the marble yard was an individual transaction on the part of defendant, having no connection with the partnership affairs, and that in joining with defendant in making the note in suit he did so merely to accommodate defendant, who received the money borrowed to his own use, and that he, plaintiff, having paid the note, he is entitled to recover the amount so paid with interest.

Defendant, on the other hand, contends that the purchase of the marble yard was a partnership venture, and that the money was borrowed and used, and the note given for partnership purposes. Plaintiff, in his complaint, demands judgment for the amount by him paid on the note, viz., \$4,650.

The jury rendered a verdict in favor of plaintiff for \$4,972, being \$322 in excess of the sum demanded in the complaint.

Plaintiff remitted the excess and took judgment for the \$4,650. After the entry of judgment defendant moved to set aside the verdict on the ground that it is not within the issues, is inconsistent with the same, and in excess of plaintiff's demand, which motion was denied, and the appeal is from final judgment, from an order denying a motion for a new trial, and from the order refusing to set aside the verdict.

The first point made by appellant is that "the verdict is not sustained by the evidence."

There was a substantial conflict in the evidence on every point essential to a recovery, and upon principle so well settled as not to require reference to the large number of cases in which the doctrine has been held, we are not at liberty to interfere with the verdict of the jury on that ground.

The second point is that "the court should have set aside the verdict on defendant's motion, because the same was outside of the issues made by the pleadings, and should have ordered an accounting."

It appears in the record that plaintiff was permitted by the court to remit from the verdict the excess over and above the amount demanded in the complaint, and that this action was excepted to by appellant.

We think the course pursued was not without warrant.

The court may disregard the action of a jury in finding as to facts not put in issue by the pleadings. (*Pierce v. Schaden*, 62 Cal. 285.)

Had the judgment been entered for the amount of the verdict it would have been cause for granting a new trial, but even then the court might have denied the motion, on condition that plaintiff remit the excess. (*Chapin v. Bourne*, 8 Cal. 294; *Harrison v. Peabody*, 34 Cal. 178; *Dreyfous v. Adams*, 48 Cal. 131; *Orr v. Hopkins*, 1 West C. Rep. 157.)

What the court could do in this respect on motion for new trial it could do on motion of plaintiff before the entry of judgment.

It was not necessary for the plaintiff to aver in his complaint or prove that he paid the note at the request of defendant.

It is a sufficient answer to this to say that the complaint avers that the plaintiff signed the note as surety only, and for the accommodation of the defendant.

By these words the request was sufficiently averred.

Upon such payment being made, if the note was given as evidence of a debt due from defendant to the payee, the law casts a liability for repayment upon defendant, and raises an implied promise on his part to reimburse plaintiff; and suit brought was a sufficient demand.

The authorities cited by the learned counsel for appellant from 2 Greenleaf on Evidence, §§ 113, 114, relate to cases where a party pays, lays out, and expends money for the benefit of another, without being legally bound so to do, in which cases a request must be averred.

No order for an accounting was proper in the case.

The answer is not framed with any such view, and defendant does not ask for an accounting therein. Defendant claimed the note to be a partnership liability. If correct in this he was entitled to a verdict. But the jury found against him on the issue, as they did also on the defense of accord and satisfaction.

The affidavit purporting to be that of G. W. Hutchins, foreman of the jury who tried the cause, cannot be considered, as it forms no part of the record, not having been embodied in any statement or bill of exceptions.

The judgment of the court below and the orders denying the motion for new trial and refusing to set aside the verdict should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 11032. In Bank.—August 26, 1885.]

JOSEPH SCHEERER, RESPONDENT, v. W. M. EDGAR,
AUDITOR OF THE CITY AND COUNTY OF SAN FRANCISCO,
APPELLANT.

MANDAMUS AGAINST COUNTY AUDITOR—DEFENDANT ACTING OFFICIALLY
—APPEAL—UNDERTAKING MAY BE DISPENSED WITH.—In proceedings
by mandamus against the auditor of the city and county of San
Francisco, the defendant acts officially, and on an appeal by him,
the undertaking provided for by section 946 of the Code of Civil
Procedure may be dispensed with.

MOTION to dismiss an appeal from a judgment of the Superior
Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

John L. Love, for Appellant.

The trial court had power to dispense with the undertaking,
as the defendant was acting in his official capacity. (Code Civ.
Proc. §§ 946, 1058.)

E. A. & G. E. Lawrence, for Respondent.

Ross, J.—This is an appeal taken by the defendant from a
judgment of the Superior Court directing a writ of mandate to
issue compelling the defendant, as auditor of the city and county
of San Francisco, to issue to the plaintiff a warrant upon the
treasurer of the city and county for the payment of a certain
sum of money. The court below, by an order made, dispensed
with an undertaking on appeal on the part of the appellant, by
virtue of that portion of section 946 of the Code of Civil Pro-
cedure which provides that “the court below may, in its dis-
cretion, dispense with or limit the security required by this
chapter, when the appellant is an executor, administrator, trustee,
or other person acting in another’s right.”

In taking the appeal the defendant was not acting in his
individual capacity, for in that capacity he was not a party to
the proceeding. He was proceeded against in his official capacity
as auditor; it was against him as auditor that the judgment
went in the court below, and in that capacity only could he
appeal. He was not acting therefore in his own individual

right, but in that of the city and county. The case therefore falls within the provision of the Code of Procedure cited, and the motion to dismiss the appeal is therefore denied.

MORRISON, C. J., MCKINSTRY, J., THORNTON, J., MYRICK, J., and MCKEE, J., concurred.

[No. 20073. In Bank.—August 26, 1885.]

THE PEOPLE, RESPONDENT, v. JAMES O'NEAL,
APPELLANT.

CRIMINAL LAW—INSTRUCTION—IMMATERIAL ERROR.—In a trial for murder an erroneous instruction to the effect that a certain act would constitute murder in the second degree, whereas it might amount to manslaughter only, is immaterial if the defendant is convicted of murder in the first degree.

ID.—DEFENDANT AS A WITNESS ON HIS OWN BEHALF.—The defendant having testified as a witness on his own behalf, the court instructed the jury in effect that in determining the weight to be given to his testimony, they must consider the circumstances under which he testified, the consequences to him from the result of the trial, and all the inducements and temptations which would ordinarily influence a person in his situation. *Held*, that the instruction was proper.

ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.—The defendant moved for a new trial, and one of the grounds of the motion was newly discovered evidence, which consisted of certain letters written by the defendant and by the sheriff of the county in which he was convicted. The letters were relied on as tending to prove the insanity of the defendant. *Held*, that the motion was properly denied.

APPEAL from a judgment of the Superior Court of the county of Sierra, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

F. D. Soward, and *M. Farley*, for Appellant.

Attorney-General Marshall, and *Stanley A. Smith*, for Respondent.

MORRISON, C. J.—The defendant was tried and convicted of the crime of murder in the first degree, and sentenced to be hanged.

The first point made on his behalf on the appeal is that the court erred in giving the jury the following instruction:—

“The unlawful killing must be with the clear intent to take life in order to constitute murder in the first degree. It must be formed upon a pre-existing reflection, and not upon a sudden heat of passion sufficient to preclude the idea of deliberation; for when there is a want of deliberation it is murder in the second degree.” The criticism on the foregoing instruction is on the latter part of it, that is to say, it is claimed that the court erred in telling the jury that “when there is a want of deliberation it is murder in the second degree,” as the crime under such circumstances might amount to manslaughter only, and not to murder in the second degree. But conceding for the purpose of the argument that the instruction was erroneous in the concluding part of it, the defendant was not prejudiced thereby, as the verdict of the jury was for murder in the first degree. It matters not therefore in the present case, whether a homicide committed without deliberation is murder in the second degree or manslaughter only. (*People v. Swift*, 66 Cal. 348.)

The next alleged error complained of, is that the court erred in giving the following instruction:—

“The defendant has offered himself as a witness on his own behalf on this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and the probability of his statements taken in connection with the evidence in the cause, you should consider his relation and the situation under which he gives his testimony, the consequences to him relating from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which he is entitled. If convincing and carrying with it a belief in its truth, act upon it; if not, you have a right to reject it.” The foregoing instruction, or one to the same effect, has been considered and approved in several cases, one as early as *People v. Cronin*, 34 Cal. 195, and another as late as *People v. Morrow*, 60 Cal. 147. But independent of any authoritative decision on the point, we think the instruction correct in principle, as was said by the court in the case of *People v. Morrow*: “It is only by virtue of a provision of the Code that he (the defendant) is permitted to testify at all, and it is

manifest that he labors under the strongest temptation to which any witness could be subjected." (60 Cal. 147.)

There is but one other point in the case deserving of notice, and that is that the court should have granted a new trial on the ground of newly discovered evidence. This alleged new evidence consists of letters written by the defendant since the homicide, and a letter written by the sheriff of Sierra County. It is claimed that this evidence tends to establish the insanity of the defendant, and it is true that the defendant's letters are very incoherent, and the sheriff expresses the opinion that the defendant is not insane but is of weak mind. We do not think that these letters by any means establish the insanity of the defendant, or that they constituted legal ground for granting him a new trial. No evidence was introduced on the trial tending to establish the insanity of the defendant, and that question was not properly before the court. The defendant was examined at great length as a witness in the case, and there is nothing in his evidence to indicate to the court that he was insane, or to make it the duty of the court to try the question of his sanity under section 1368 of the Penal Code.

Judgment and order affirmed.

MYRICK, J., THORNTON, J., MCKINSTRY, J., and ROSS, J., concurred.

[No. 9986. Department One.—August 27, 1885.]

IN THE MATTER OF THE ESCHEATED ESTATE
OF JOHN GUILFORD, DECEASED. ANNE LYONS
ET AL., RESPONDENTS, v. THE STATE OF CALI-
FORNIA, APPELLANT.

ALIEN—INHERITANCE—STATUTORY PROVISION—CONSTITUTIONAL LAW.—Under section 671 of the Civil Code, a non-resident alien may inherit property in this State, and there is nothing in the Constitution to the contrary.

ID.—HOW PROPERTY CLAIMED—PERSONAL APPEARANCE OF ALIEN.—In order to obtain the property it is not necessary that the alien should appear in person and claim it; he may act through an attorney.

ID.—PROPERTY VESTS IN HEIRS.—The property of a person dying intestate, leaving non-resident alien heirs, vests in them and not in the State, subject to be divested if they fail to appear and claim it within the time and in the manner provided by statute.

APPEAL from a judgment of the Superior Court of Sacramento County.

The facts are stated in the opinion.

Attorney-General Marshall, and S. P. Scaniker, for Appellant.

Under section 17, article i. of the Constitution, an alien must be a *bona fide* resident to be an heir and successor. The petitioners never having been in California, cannot inherit property here. (Civ. Code, § 671; *Spratt v. Spratt*, 1 Peters, 343.)

Henry Perry, for Respondents.

The petitioners are aliens, and as such entitled to take by succession although they are non-residents. (*People v. Rogers*, 13 Cal. 159; *Estate of Billings*, 64 Cal. 427.)

BELCHER, C. C.—John Guilford, a resident of Alameda County, died in that county intestate in December, 1876, leaving real and personal property, but no heirs in this State. The public administrator of the county was appointed administrator of the estate and took possession of all its property.

In 1879, the attorney-general in pursuance of the provisions of section 1269 of the Code of Civil Procedure, filed an information on behalf of the State in the proper District Court, in which he set forth all the facts required by that section and prayed for a judgment of the court that the State be seized of the property of the estate.

Summons was issued on the information and served on the administrator of the estate and the county treasurer of Alameda County, and an order was made and published as required by law.

The administrator and county treasurer appeared and filed answers admitting all the allegations of the information to be true. No one else appeared, and thereupon judgment was rendered that the State be seized of the lands and tenements in the information claimed. This proceeding was commenced in the Superior Court of Sacramento County, under the provisions of section 1272 of the Code of Civil Procedure. In their petition the petitioners described themselves as all residents of the county

of Dublin, Ireland, and allege that they are the heirs at law, and only heirs of John Guilford, deceased, and that they had no notice, actual or constructive, of the proceedings under the information. The petition was signed by the petitioners by their attorney in fact and attorney at law, and was served on the attorney-general, who appeared and answered thereto by a general denial. The case was tried by the court, and judgment rendered in favor of the petitioners. From that judgment this appeal is taken.

It is now claimed on behalf of the State that the judgment was wrong and should be reversed because the petitioners were residents of Ireland, and therefore were not permitted under our Constitution and laws to take property by succession. Section 671 of the Civil Code provides that "any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this State," but it is insisted that the petitioners were neither citizens nor aliens, and therefore not within its provisions. The word "alien," it is said, means a person who was born in another country and has come to this country, and is here residing either permanently or temporarily; in the one case being a resident alien, and in the other a non-resident alien.

This position cannot be maintained. According to Webster the word "alien" means "a foreigner, one born in or belonging to another country. . . . In American law, one born out of the jurisdiction of the United States and not naturalized," and the word "foreigner," "a person belonging to a foreign country, or without the country or jurisdiction under consideration."

In *Dawson's Lessee v. Godfrey*, 4 Cranch, 321, it was held that a person who was born in England and always resided there and was never in the United States, was an alien. (See also *Jones et al. v. McMasters*, 20 How. 8.)

It is next claimed that under section 17 of article i. of the Constitution of the State, only those foreigners who are *bona fide* residents of this State can inherit property here, and that all the provisions of the Codes which give the right to inherit to foreigners who are not *bona fide* residents, are inconsistent with the provisions of that section, and are repealed by section 1 of article xxii. of the Constitution.

A sufficient answer to this is found in the fact that in two well-considered cases this court has held otherwise, and we

are satisfied with those decisions. (*People v. Rogers*, 13 Cal. 159; *Estate of Billings*, 64 Cal. 427. See also *Purezell v. Smidt*, 21 Iowa, 540.)

It is also earnestly insisted that no non-resident alien can take property in this State by succession unless he comes here in person to claim the same, and that the petitioners failed to do that, and therefore their judgment must be reversed.

The Civil Code provides as follows: "Section 672. If a non-resident alien takes by succession, he must appear and claim the property within five years from the time of succession or be barred. The property in such case is disposed of as provided in title 8, part 3, of the Code of Civil Procedure."

"Section 1404. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no non-resident foreigner can take by succession unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession."

Title 8, part 3, of the Code of Civil Procedure relates to escheated estates, and section 1272 provides: "Within twenty years after judgment, in any proceeding had under this title, a person not a party or privy to such proceeding may file a petition in the Superior Court of the county of Sacramento, showing his claim or right to the property or the proceeds thereof. . . .

All persons who fail to appear and file their petitions within the time limited are forever barred; saving, however, to infants, married women, and persons of unsound mind, or persons beyond the limits of the United States, the right to appear and file their petitions at any time within the time limited, or five years after their respective disabilities cease."

There is nothing in the record to show that this point was made in the court below, or that the petitioners did not appear in person, except the fact that they describe themselves in their petition as "all residing in the county of Dublin, Ireland," and the further fact that the petition is signed by their attorney in fact and attorney at law.

But assuming that they did not come to this State in person to file their petition and claim the property, was it necessary that they should?

We do not think it was. The general rule is that parties, whether plaintiff or defendant, resident or non-resident, may appear in court to claim their supposed rights either in person or by attorney. The plaintiff appears when he files his complaint subscribed by himself or his attorney. The defendant appears when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him. Either party may appear in an action though he be not and never was in this State. Why should the word "appear," as used in the above quoted sections of the Codes, have any other or different meaning than that ordinarily given to it? We cannot doubt that if the legislature had intended to say that no non-resident alien could claim any property in this State by succession unless he came here in person to make his claim, it would have used other language, showing clearly its meaning.

The last point made is that under section 4 of article ix. of the Constitution, upon the death of Guilford all his property vested *eo instanti* and absolutely in the State for the benefit of the school fund, and that it cannot be taken therefrom.

That section provides that "all estates of deceased persons who may have died without leaving a will or heir . . . shall be and remain a perpetual fund, the interest of which together with all the rents of the unsold lands . . . shall be inviolably appropriated to the support of common schools throughout the State."

The fault in the argument is that Guilford did not die without heirs. The petitioners were his heirs, and the property of his estate vested in them subject to be divested if they did not appear and claim it within the time and in the manner provided by statute.

The case of *State v. Reder*, 5 Neb. 203, is not in point. In that case the deceased left no heirs, and his estate was held to have vested absolutely and wholly in the State. Under a constitutional provision similar to ours, the proceeds of the estate were placed in the school fund, and the legislature had attempted to divert them to other objects, but the court said the act "is a mere nullity and confers upon the trustees therein named no rights or power over the estate."

We think the judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

Hearing in Bank denied.

[No. 9987. Department One.—August 27, 1885.]

IN THE MATTER OF THE ESCHEATED ESTATE
OF AUGUST LEOPOLD, DECEASED. JAUN M. CAR-
RASCO, RESPONDENT, *v.* THE STATE OF CALI-
FORNIA, APPELLANT.

ALIEN HEIR—ASSIGNMENT—RIGHT OF ASSIGNEE.—A non-resident alien may assign property inherited by him in this State, and the assignee may appear and claim it.

Id.—CASE APPROVED.—*Lyons v. State of California, supra*, approved as to the points there decided.

APPEAL from a judgment of the Superior Court of Sacramento County.

The facts are stated in the opinion.

Attorney-General Marshall, and *S. P. Scaniker*, for Appellant.

Page & Eells, for Respondent.

BELCHER, C. C. — It appears in this case that one August Leopold Mongard died intestate in Santa Barbara County in 1870. He left surviving him a widow and one minor child, who were both residing in the Republic of Chile. His estate was administered in the Probate Court of Santa Barbara County, and after paying all claims against it and the expenses of administration, there was left the sum of \$1,459 in gold coin. No one appeared to claim this money as heir, and under proceedings commenced by the attorney-general, in pursuance of the provisions of section 1269, of the Code of Civil Procedure, it was paid into the State treasury. The property of the estate was common property, and the minor child died, leaving its mother its only heir.

The widow by an instrument in writing, sold and transferred to Carrasco, the petitioner, all her right to the proceeds of the estate. The petition by Carrasco, under section 1272 of the Code of Civil Procedure, that this money be paid over to him, was signed by his attorney in fact and attorneys at law.

The case was tried, the attorney-general appearing for the State, and judgment rendered in favor of the petitioner.

From that judgment the appeal is taken.

This case in its main features is the same as the case of *Lyons et al. v. The State of California*, just decided. All the points made in that case are made here, and upon those points nothing more need be said.

It is further claimed in this case that if the widow of the deceased could have appeared and claimed the proceeds of his estate, her assignee cannot do so, and that his petition therefore states no cause of action.

At common law aliens could not take property by descent or other mere operation of law. (*Farrell v. Enright*, 12 Cal. 450; *Lick v. Stockdale*, 18 Cal. 218.)

We have now changed the rule of the common law in this respect, by providing that "any person, whether citizen or alien, may take, hold, or dispose of property, real or personal, within this State." (§ 671, Civ. Code.) We have also provided that the "Code establishes the law of this State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and promote justice." (§ 4, Civ. Code.)

A non-resident alien may take property by succession, but he must appear and claim it within a given time. (§ 672, Civ. Code.) This, as we held in *Lyons v. State of California*, *supra*, does not mean that he must necessarily appear in person. The manifest object of the provisions of the Codes, touching this matter, was to give to non-resident aliens substantially the same rights to the property of a deceased relative as are secured to resident aliens by the Constitution. And these provisions must be liberally construed to effect the object intended.

Ordinarily one who has property, whether it be tangible or a mere right of action, may sell it, and the purchaser will have and may assert the same rights to it that the seller had. A

resident alien might sell his interest in the property of an estate and the purchaser would be permitted to appear and take that interest. Why should not the non-resident alien and his assignee have the same rights in this respect as the resident alien and his assignee?

The non-resident must "appear and claim" the property, but he does that whether his appearance be in person or by attorney, or by an assignee. To give to the word "appear" any other meaning would be evidence that we construe narrowly and not liberally the provisions of the Codes.

The judgment we think should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

Hearing in Bank denied.

[No. 9610. Department One.—August 27, 1885.]

MILLICENT R. MAULDIN, RESPONDENT, v. FRED-
ERICK COX ET AL., APPELLANTS.

MARRIED WOMAN—HOMESTEAD—ACTION TO RECOVER POSSESSION—ADVERSE POSSESSION—STATUTE OF LIMITATIONS.—A married woman may maintain an action in her own name without joining her husband to recover possession of the homestead property; and as to such property, the Statute of Limitations will run against her in favor of an adverse possessor.

ID.—HOMESTEAD CANNOT BE HELD ADVERSELY BY EITHER HUSBAND OR WIFE.—During coverture, and while the husband remains the head of the family, neither party to the marital relation can hold the homestead adversely to the other.

ID.—LEASE OF HOMESTEAD BY HUSBAND—TENANT CANNOT HOLD ADVERSELY TO WIFE.—A tenant under a lease of the homestead executed by the husband without the concurrence of the wife is estopped during the existence of the term from asserting an adverse possession against either the husband or the wife.

ID.—POSSESSION WHEN ADVERSE.—Adverse possession such as will set the Statute of Limitations in motion must be open and notorious as well as continuous, and of such a character as to operate as notice to the owner that possession is held under a claim of right, and to establish an ouster of the owner.

ID.—OWNER MUST HAVE NOTICE OF ADVERSE CLAIM.—The owner has a right to be informed of the claim set up against him, either by acts or words, before the statute will run; and if the acts of the party in possession are of such a character as reasonably to indicate to the owner that the holding is not adverse, but in subordination to the title, the statute will not run.

1D.—EVIDENCE—ENTRY UNDER LEASE.—On a review of the evidence, *held*, that the acts of the defendants, subsequent to their entry into the homestead under a lease from the husband, were not sufficient to indicate to the wife that their holding was adverse.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

Hart & White, for Appellants.

Grove L. Johnson, and *Thornton & Merzbach*, for Respondent.

SEARLS, C. — Action of ejectment to recover a tract of land in Sacramento County. The cause was tried before a jury, verdict and judgment for plaintiff. Defendants moved for a new trial which was denied, and the cause comes upon appeal from final judgment and order overruling motion for new trial.

The facts necessary to a determination of the questions involved are as follows:—

In 1852 plaintiff, then a married woman and the wife of B. F. Mauldin, settled with her husband upon the land in question, where they continued to reside with their family until 1867. On the 31st day of August, 1860, a declaration of homestead in due form was executed by the plaintiff and her husband jointly, covering the land, and which declaration duly acknowledged, was recorded in the office of the county recorder of Sacramento County, October 15, 1860. On the 10th day of June, 1869, a patent from the State of California was issued to B. F. Mauldin, the plaintiff's husband. Patent recorded August 18, 1871. In 1867 plaintiff and her husband removed from the said premises, and took up their residence in the city of Sacramento, where they continued to reside until the 10th day of June, 1882, when B. F. Mauldin died. The sons of plaintiff and her husband remained upon the land about one year after their parents removed therefrom and then left it, since which time none of the family have occupied the land or any part thereof.

On the 27th day of September, 1871, B. F. Mauldin executed a lease of the premises to defendants for a term of two years from February 8, 1872, rent reserved \$400 for the term. The

lease was duly acknowledged and recorded June 11, 1872. Before the expiration of the term, and on the 11th day of June, 1872, said B. F. Mauldin executed and delivered to defendants a second lease of the same premises for a term of ten years from January 1, 1874, rent reserved \$900 for term, lease acknowledged and recorded June 11, 1872. On the 25th day of October, 1876, said B. F. Mauldin executed to defendants a deed of conveyance of all the land in question, which deed was duly acknowledged and delivered by the grantor, but never recorded. Nominal consideration, \$2,500. The real consideration as stated by defendant Clark was \$1,500, made up as nearly as we can determine from his testimony as follows:—

Rent reserved on ten years' lease.....	\$900
Interest	300
Cash paid at execution of deed.....	200

Total\$1,500

On the 22d day of January, 1880, said B. F. Mauldin executed and delivered to defendants a third lease of the same premises for a term of ten years from date, rent reserved \$1,000 for term. The lease was signed and acknowledged by defendants also, and duly recorded at request of defendant Clark, January 31, 1880. No consideration was actually paid therefor. The plaintiff herein was not a party to either or any of the leases, or to the deed of conveyance, and had no knowledge of the execution or existence of said deed until after the death of her husband in 1882.

Defendants entered into possession under their first lease, and have ever since retained such possession, using the land for grazing and other purposes, of which possession by defendants plaintiff was cognizant.

This action was brought August 10, 1883. The *locus in quo*, having been by the acts of plaintiff and her deceased husband dedicated as a homestead, and plaintiff not having joined in the leases or deed thereof as provided for the conveyance of a homestead, it is not contended that she has lost her right thereto by any direct and affirmative act of her own.

Defendants have pleaded the Statute of Limitations, and set up an adverse possession of more than five years next before

suit brought, under which they claim the right of plaintiff to recover is barred.

It is provided by section 370 of the Code of Civil Procedure that "when a married woman is a party, her husband must be joined with her, except when the action concerns her separate property, or her right or claim to the homestead property, she may sue alone."

The action in this case clearly related to her right and claim to the homestead property; consequently the husband was not a necessary party, and plaintiff could at any time have maintained an action in reference thereto without joining her husband as a party plaintiff.

As to this property there was no existing disability by reason of coverture; hence it follows that the Statute of Limitations may be successfully invoked against plaintiff, provided the facts establish an adverse possession in defendants as against her. (*Kapp v. Griffith*, 42 Cal. 408; *Wilson v. Wilson*, 36 Cal. 447.) We are therefore led to an inquiry as to the sufficiency of the facts to constitute adverse possession in defendants against this plaintiff. Defendants entered into possession of the demanded property under lease from B. F. Mauldin of October 4, 1871, and continued as his tenants under that and the subsequent lease of ten years, dated June 11, 1872, which took effect January, 1874, until the execution and delivery by Mauldin of the deed of conveyance dated October 25, 1876; as such tenants they were estopped from denying the title of their landlord during that period.

The fact that these leases were liable at any time to be avoided by the wife of Mauldin for want of capacity in her husband to make them upon the homestead does not alter the rule. The tenant is estopped, during his term, from denying the title of his landlord, not because the title is good, but because by accepting a lease and entering under it he has acknowledged the title to be in his lessor, and is precluded from showing facts inconsistent with such acknowledgment.

They were also estopped during the same term from claiming the homestead adversely to the wife of Mauldin, the plaintiff herein. It was held in *Frink v. Alsip*, 49 Cal. 102, that where the husband rents land from the owner and moves on to it with

his family in subordination to the owner's title, the wife cannot, during coverture, claim the premises adversely to the owner so as to set the Statute of Limitations in motion.

In *First National Bank of S. B. v. de la Guerra*, 61 Cal. 109, it was held that the wife could not claim during coverture, adversely to the husband or to those holding under him.

We think the converse of the proposition is also true, and that during coverture and while he remains the head of the family the husband cannot claim the homestead adversely to the wife. As the head of the family he may select the place of residence. He may choose any reasonable place or mode of living, and the wife must conform thereto. (Civ. Code, § 156.)

He may remove his family from the homestead at will, subject only to the selection of a reasonable place of residence. He may manage and control the common property, and over the homestead may with propriety exercise acts of ownership, which in another would be evidence of an adverse holding, but which in the husband indicate the assertion of the mutual rights of the parties to the marital relation.

Section 370 of the Code of Civil Procedure gives to a married woman a right to sue alone, when the action is against her husband, or when her separate property or her right or claim to the homestead is concerned. No question is made as to her right to sue her husband where her right to the homestead is invaded. The remedy is given where her right is invaded, whether by the husband or a stranger. The question under discussion, however, is not has she a remedy? but may her right be invaded by an adverse holding on the part of the husband so as to render such remedy necessary?

It would seem more in harmony with our conception of the marital relation to say that while the husband remains the head of the family, that as to the homestead his acts of possession and control will be taken as evidence of joint ownership with the wife, and that no presumption of an adverse holding can be indulged or allowed. If he may hold adversely to his wife, her right to the homestead can be determined without her consent and in a manner different from that contemplated by the Code. Her right to maintain an action against him, upon his claiming adversely, will result in gauging her title, not by the certain

provisions of the Code, but by the more uncertain oral testimony of witnesses. The acts of the husband in controlling the property, in themselves innocent and proper, will be liable in after years to be tortured into evidence of an adverse holding, where none was originally designed. All necessity for vigilance between husband and wife in guarding their property rights, should be, as far as may be, avoided. Again, if the husband can hold the homestead adversely to the wife, then she may maintain ejectment for its recovery, but when restored to possession her husband may at once rightfully remove her from the premises, or if his adverse possession shall have ripened into a title, which enables him to prevail in an action, he must continue to keep her out of possession, or she may again file a declaration of homestead on the same property, and start anew on the circuit of strife and litigation.

For these and other reasons we conclude that during coverture, and while the husband remains the head of the family, neither party to the marital relation can hold the homestead adversely to the other.

There is nothing in the record to show that B. F. Mauldin ever claimed the homestead adversely to plaintiff, and as defendants are estopped from claiming adversely against the former while holding under the lease, so they cannot claim during the same period against plaintiff, who was a joint owner with her husband of the title and property, out of which their estate was carved, and into the possession of which they entered.

Second — It is claimed by defendants that whatever their position as to plaintiff may have been prior to the deed from Mauldin of October 25, 1876, since the execution and delivery of that deed they have been in the adverse possession of the property, and as more than five years had elapsed between the delivery of the deed and suit brought, plaintiff's right is forever barred.

An essential element of the adverse possession which will set the Statute of Limitations in motion is, that it be open and notorious, as well as continuous; it must be of such a character as to operate as a notice to the holder of the true title that possession is held under a claim of right. The acts of the possessor should indicate clearly that he holds, not for the true owner or in subordination to his title, but for himself and in opposition

to such owner. The acts should be such as, when proven or admitted, will establish an *ouster* of the owner. He must be entitled to maintain an action before the Statute of Limitations will run against him.

He has a right also to be reasonably informed of the claim set up against him, either by acts or words before the statute will run, and if the acts of the party in possession are of such a character as reasonably to indicate to the owner that the holding is not adverse, but in subordination to the title, the statute will not run.

In the present case the defendants were in possession as tenants under leases of record, and which would not expire until January 1, 1884.

In 1880 another lease for ten years from date by Mauldin to defendants, executed and acknowledged by all the parties thereto, was placed on record.

Plaintiff knew defendants were in possession of the premises. This was sufficient to put her upon inquiry; such inquiry, if pursued, showed that they went into possession as tenants of her husband, and in subordination to the title held by him jointly with herself.

We must presume her to have known that under section 326 of the Code of Civil Procedure the possession of the tenant is deemed the possession of the landlord, not only during the existence of the lease, but for five years after the termination of the tenancy. Of the absolute deed which her husband made to defendants and which was never recorded, she knew nothing. Indeed, its existence seems to have been studiously concealed from her.

To plaintiff then, the possession of defendants naturally presented the idea of subordination to the right or claim held by her to the homestead. It was such in its inception; for ought she knew or could learn, it remained as such up to the death of her husband.

The fact that the leases were void as against her, avails nothing in favor of defendants. He who enters under a void lease is estopped equally with him who holds under a valid instrument.

It is true the defendants testify in substance that they only accepted the lease of January 20, 1880, at the urgent request

of B. F. Mauldin; that they did not desire it; that they paid no rent, and did not enter into possession thereunder.

We assume these statements to be true, but there are two answers:—

First—These facts were unknown to plaintiff. To her the case was only presented in the aspect of a new lease for a term of ten years, executed by her husband and defendants upon the homestead.

Under the facts, as they then appeared to her, defendants could not set up an adverse title.

Second—Placing out of view altogether the lease of 1880, and treating it as never having been made, we still find the lease of June 11, 1872, for ten years commencing January 1, 1874, and which consequently would not expire until January, 1884, and which leaves defendants as against plaintiff in no better position.

They had, it is true, a secret conveyance of the property, but having been in possession under the lease, the plaintiff having no notice of the deed was not bound thereby.

An entry to set the Statute of Limitations in motion must be sufficiently open and notorious to give the owner notice of the hostile claim and possession begun thereunder, and it must be hostile.

The owner must have knowledge of the adverse entry, or such information as puts him upon inquiry. (Sedgwick & Wait on Trial of Title to Land, § 730.)

“Such knowledge, or the means by which such knowledge may be attained, must be brought home to the person who was seized or possessed of the land, because the statute proceeds on the ground that he, knowing that a cause of action exists in his favor for the intrusion, yet acquiesces in it, and does not attempt to regain the possession of his land in the mode provided by law. A clandestine entry or possession will not set the statute in motion, because the owner of the land cannot be said to have acquiesced in the wrongful entry or possession. The owner will not be condemned to lose his land, because he has failed to sue for its recovery when he had no notice that it was held or claimed adversely.” (*Thompson v. Pioche*, 44 Cal. 508.)

These views are conclusive of the right of defendants to recover on their claim of adverse possession and of the whole case.

The instructions of the learned judge, who tried the cause in the court below, afford defendants no ground for complaint.

The judgment and order denying a motion for a new trial should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in Bank denied.

[No. 9602. Department One.—August 27, 1885.]

SAMUEL KEYBERS, APPELLANT, v. JOHN McCOMBER, RESPONDENT.

JUSTICE'S COURT—JUDGMENT—JURISDICTION MUST AFFIRMATIVELY APPEAR.—A Justice's Court is an inferior court, and a party relying upon or claiming any right under its judgments must affirmatively show its jurisdiction.

ID.—SUMMONS—DEFECTIVE STATEMENT IN—VOIDABLE JUDGMENT—DEFAULT.—The summons in an action in a Justice's Court for a trespass on land contained a statement that in case of the defendant's failure to answer, "the plaintiff would take judgment for the amount claimed in the complaint." *Held*, that a judgment by default rendered after a personal service on the defendant was voidable only and could not be collaterally attacked.

EXEMPTION FROM EXECUTION A PERSONAL PRIVILEGE.—Exemption of property from execution is a personal privilege which may be claimed or waived at the option of the debtor.

ID.—HOW AND WHEN MUST BE CLAIMED.—Where a debtor has more property of a particular kind than is exempt from execution, and a writ is levied upon a portion thereof, leaving as much as the law exempts, and thereafter the debtor claims as exempt a portion of the property levied upon, the residue in the hands of the officer being insufficient to satisfy the writ, the debtor to make good his claim of exemption must offer to surrender to the officer the other property of the same general kind subject to execution, or so much as may be necessary to satisfy the writ, and failing to do so he is not entitled to recover against the officer for an unlawful seizure.

APPEAL from a judgment of the Superior Court of Sacramento County.

The facts are stated in the opinion.

W. H. Beatty, and *S. C. Denson*, for Appellant.

A. P. Catlin, and *W. C. Crosette*, for Respondent.

SEARLS, C.—This is an action to recover possession of two horses, their harness, and a quantity of wood; or if a delivery thereof cannot be had, the value thereof and damages for detention.

Defendant had judgment. The appeal is from this judgment, and the case rests upon the judgment roll.

The demanded property was taken by the defendant as a constable under an execution regular in form and valid on its face, issued from a Justice Court against the property of plaintiff. Plaintiff contends the taking was wrongful, and bases his claim upon two grounds:—

1. That the summons was fatally defective in this: The action was for damages on account of trespass upon land, and the summons, in other respects in due form, instead of a notice as required in such cases by subdivision 5 of section 844 of the Code of Civil Procedure, that if defendant (plaintiff here) failed to answer, the plaintiff would “apply to the court for the relief demanded” contained the notice specified in subdivision 4 of the same section, viz., that in case of failure to answer plaintiff would take judgment for \$299, that being the sum claimed in the complaint.

2. That conceding the regularity of the judgment against him, the two horses and their harness were exempt from execution.

First, as to the validity of the judgment. A Justice Court is an inferior court, and its jurisdiction must be shown affirmatively by a party relying upon or claiming any right under its judgments. (*Jolley v. Foltz*, 34 Cal. 321.) No presumption will be indulged in favor of the jurisdiction of inferior courts. (*King v. Randlett*, 33 Cal. 318.)

In Superior Courts, the presumption is in favor of the regularity of their proceedings and of their jurisdiction, and he who challenges either must show affirmatively the grounds of his objection.

It does not follow, however, that the rule of decision differs upon the same facts when ascertained. It is only in the mode of ascertaining them that the distinction exists.

In a *court of record* a given fact is presumed, but when shown by the record not to exist, error is made to appear; in a *Justice Court* the same fact must be proven, or it will be presumed not

to exist, and like error is manifest. It has been said that the "law required courts of special jurisdiction to follow the rules which create and govern them, and that that which in a court of general jurisdiction would be a mere irregularity, would absolutely deprive the former of all jurisdiction." (*Whitwell v. Barbier*, 7 Cal. 54.) Similar language may be found in a number of cases, but an examination shows that in most of them it is used to illustrate the doctrine that in courts of record facts not appearing will be presumed to exist, and their non-appearance will be treated as a mere irregularity, while their absence in cases arising in inferior tribunals will be deemed fatal to the validity of the proceedings. If it appears upon the face of the proceedings that a court of record had no jurisdiction, manifestly it must be as fatal to a judgment as would the absence of the same fact in a court of limited jurisdiction.

We are not now referring to the distinctions made in reference to jurisdiction of the subject-matter in different courts, but to the jurisdiction of the person.

The latter in this State is gained in ordinary civil actions in courts of original jurisdiction through the instrumentality of a summons, except in cases of voluntary appearance.

The summons in cases arising in our Superior Courts is in substance the same as those issued from Justice Courts. Each is required to contain the same notice to the defendant, viz., in cases arising on contract for the recovery of money or damages only, that if defendant fails to answer judgment will be taken against him for the sum claimed, stating it. In other actions a notice that unless defendant so appear and answer, the plaintiff will apply to the court for the relief demanded. (Code Civ. Proc. §§ 407, 844.) Jurisdiction of the person of the defendant is gained alike in the Superior and Justice Courts by service of the summons. Against his consent jurisdiction can be gained in no other manner.

The requirements of the summons as to the notice, being the same in both courts, if we are correct in our conception of the principal involved, it necessarily follows that if the error complained of appeared affirmatively upon the record of a Superior Court to the exclusion of every presumption, it should receive precisely the same interpretation as would be given to it in a Justice Court.

In this view of the case the question for decision is, was the judgment of the Justice Court *void* or only *voidable*? That the notice contained in the summons was defective, and that the judgment was erroneous and subject to be set aside by the justice or reversed on appeal is conceded on all hands. It was certainly *voidable*.

Was it void? The summons and complaint were properly served upon defendant; he failed to answer, a trial was had and judgment was rendered against him for \$299, the sum demanded in the complaint and specified in the summons. The court had jurisdiction of the subject-matter of the suit, and if the summons is to be deemed as sufficient to give jurisdiction of the person of the defendant, then the judgment being such as the justice had a right to render, though irregular and subject to reversal, was valid and binding until directly attacked, and is not subject to review in this collateral proceeding.

In *State of California v. Woodlief*, 2 Cal. 242, the summons required defendant to answer in thirty days instead of forty, as by statute required, and was in other respects defective, and this court held it was insufficient to support a judgment by default. This case, however, came up by a direct appeal from the judgment, and cannot be considered as concluding a case in which the question arises collaterally.

Porter v. Herman, 8 Cal. 619, is to the same effect, and the question arose in like manner. *People v. Weil*, 53 Cal. 253, also came up on appeal, and a like doctrine was maintained. In *Polack v. Hunt*, 2 Cal. 193, the summons was defective and the court below permitted it to be amended. On appeal it was urged that the summons did not contain a similar notice to defendant, as that now required by the Code, and that the court gained no jurisdiction. This position was overruled and the action of the court below was approved. In *Ward v. Ward*, 59 Cal. 141, the appeal was from an order vacating a judgment by default, entered in an action upon a contract of marriage, and the summons was defective in substantially the same particular as here, and the court say: "We have no doubt that the entry of a judgment by default in the absence of a notice in the summons that in case the defendant failed to appear and answer within the time prescribed by law, the plaintiff would take

judgment for the sum demanded in the complaint, was at least such an irregularity as would justify the court in vacating the judgment."

But from the cases above enumerated we can make but little progress in an inquiry directed solely to the validity of a judgment when collaterally attacked. "While it is advisable in all cases to literally comply with the provisions of the Code, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it. 'Its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.'" (*Shinn v. Cummins*, 65 Cal. 97.) Such errors as are not prejudicial to parties are to be disregarded everywhere, and those which are prejudicial when committed by a court having jurisdiction to act must be taken advantage of by direct proceedings.

In this case the summons was, save in the one respect, regular, it was served with the complaint. The defendant was thereby apprised of the nature and scope of the action, of the time and place for answer, and the amount or sum of money sought to be recovered.

The summons was, we think, so far regular as to confer jurisdiction of the person of defendant upon the court, and make it a duty of the former to combat the proceedings if he would not be bound by them. It cannot be likened to a case in which there is no service, and in which a defendant may not be aware of the proceedings against him, but is a case of service of an irregular process, which might have been amended, because irregular and not void, or might have been set aside by the court from which it issued, or on an appeal, but which could not be entirely ignored; which was in short *voidable* and not *void*, and therefore the judgment predicated upon it cannot be attacked in this collateral proceeding. The following cases, though not directly in point, have a bearing on the question: *Dorante v. Sullivan*, 7 Cal. 279; *Chemung Canal Bank v. Judoon*, 4 Seld. 254; *Drake v. Duvenick*, 45 Cal. 455; *Freeman on Judgments*, §§ 126-135; *Sacramento Savings Bank v. Spencer*, 53 Cal. 740; *Cloud v. El Dorado County*, 12 Cal. 135.

Second—As to the exemption of the two horses and their harness.

Plaintiff was a farmer and had eight work horses, besides a number of colts. His sons managed the farm on shares. One of his sons was at Folsom with a four-horse team when defendant, as constable, levied upon and took into possession the two lead horses and their harness, under an execution regular in form and against the property of plaintiff.

On the 16th day of November, 1883, plaintiff served a written notice upon defendant, claiming the two horses and their harness as exempt from execution under subdivision 3 of section 690 of the Code of Civil Procedure. He did not tender defendant any of the other horses, or any property in lieu of the two horses levied upon. Defendant delivered the horses and harness to plaintiff on the 19th of November, 1883, three days after the demand.

Under the third subdivision of section 690 of the Code of Civil Procedure, two horses and their harness of plaintiff, a farmer, were exempt from execution.

This exemption was a personal privilege of plaintiff which he could claim or waive at his pleasure.

Having more horses than the number exempt by law, plaintiff had a right to elect which he claimed as exempt. It was not incumbent upon him to make the election at the date of the levy, for so far as appears, he was not present thereat; but it devolved upon him to do so within a reasonable time after notice of such levy.

This he did, and six days after the levy gave notice to the officer that he claimed the two horses and their harness as exempt from execution.

In the absence of a showing to the contrary, this notice will be deemed to have been in time.

Where the debtor has more of a particular kind of property than is exempt from execution, he may select which he will claim, but in doing so, "according to a preponderance of authorities, the defendant, in claiming the right of selection, must offer to surrender to the officer the other property in his hands subject to execution." (Freeman on Executions, § 212; *Smother's v. Holly*, 47 Ill. 331; *Bonnell v. Bowman*, 53 Ill. 460.) There would seem to be reason in this requirement.

We should not lose sight of the beneficial objects of the exemption laws, or do or say ought to abridge the rights secured thereby.

On the other hand, the wise provisions of these laws should not be used as a means for unjustly shielding property not exempt from the claims of creditors.

It is quite proper to give the debtor a reasonable time within which to make his selection of that which he will claim; but if he does not do so at the time a levy is made, the opportunities and temptations to dispose of property not levied upon, or place it beyond the pale of the law, and then claim as exempt that which has been taken in execution, becomes great, and if yielded to may result in a fraud upon creditors.

If the exemption is claimed at the time of levy, there being other property of the same kind not claimed, it is reasonable to suppose the officer holding an execution will levy upon that not claimed, and his opportunity to do so should not be abridged by reason of the claims of exemption being asserted at a later date.

We hold, therefore, where, as in this case, the debtor has more property of a particular kind liable to seizure than is exempt from execution, and a writ is levied upon a portion only thereof, leaving as much as is by law exempt, and thereafter the debtor for the first time claims as exempt the property levied upon or a portion thereof, and leaving in the hands of the officer a less quantity than is necessary to satisfy his writ, then, and in that case, the debtor to make good his claim of exemption must offer to surrender to the officer the other property in his hands of the same general kind, subject to execution, or so much thereof as may be necessary to satisfy the writ, and failing to do so, as in this case, he is not entitled to recover against the officer.

We limit the rule as above to cases where the judgment debtor has other property of the particular kind taken, for the reason that the facts of this case do not require us to extend the inquiry to cases where a judgment debtor may have property of a different character subject to execution, and in the consideration of which, questions as to the duty of the debtor to assist the officer of the law in ferreting out his property may arise.

The judgment of the court below should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

[No. 9486. Department Two.—August 27, 1885.]

GEORGE E. WHITE, RESPONDENT, v. JOSEPH H. DISHER,
APPELLANT.

FALSE WITNESS MUST BE DISTRUSTED—INSTRUCTIONS.—Under section 2061, sub-division 3, of the Code of Civil Procedure, a witness false in one part of his testimony is to be distrusted in others, and an instruction to the jury that such a witness *may* be distrusted is error.

ID.—PRESUMPTION AS TO DISTRUST—FUNCTION OF JURY.—The distrust which is cast upon a witness wilfully false in a material part of his testimony is a presumption of law for the court, with which the jury have nothing to do, except to receive and act upon it. It is a rebuttable presumption, however, and may be overcome by facts and circumstances of which they are the sole judges.

APPEAL from a judgment of the Superior Court of Trinity County, and from an order refusing a new trial.

The facts are stated in the opinion.

W. J. Tinnin, and *T. L. Carothers*, for Appellant.

C. E. Williams, *J. W. Philbrook*, *L. D. Latimer*, and *Frederick S. Stratton*, for Respondent.

SEARLS, C.—Action to recover damages on breach of contract. Plaintiff had verdict and judgment for \$714 and costs. Defendant moved for a new trial, which was denied, and the appeal is from final judgment and order overruling motion for new trial.

We have examined the several errors assigned by appellant, and conclude that with a single exception they are not supported by law.

The exception referred to is as follows:—

At the trial defendant asked the court to instruct the jury in these words:—

“A witness wilfully false in one part of his testimony is to be distrusted in his other testimony.” The instruction was modified by the court by striking out the words “is to,” and inserting in lieu thereof the word “may,” so that the instruction as given reads: “A witness wilfully false in one part of his testimony *may* be distrusted in his other testimony.”

To which modification of the instruction defendant excepted, and the ruling is assigned as error.

Section 2061 of the Code of Civil Procedure, subdivision 3, provides: "That a witness false in one part of his testimony is to be distrusted in others."

The rule as formulated in the Code is substantially the same as that laid down by law-writers and followed by the courts prior to the adoption of our Codes.

In *People v. Sprague*, 53 Cal. 494, the court say: "The maxim *falsus in uno, falsus in omnibus*, is not to be construed as authorizing a court to charge that if a witness *perjures* himself in respect to one or more particulars, the jury must reject all his testimony. (*People v. Strong*, 30 Cal. 156.)

"The rule is that the jury *may* reject the whole of the testimony of a witness who has wilfully sworn falsely as to a material point, that is to say, the jury being convinced that a witness has stated what was untrue, not as the result of mistake, or inadvertence, but wilfully and with the design to deceive, must treat all his testimony with distrust and suspicion, and reject all, unless they shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

"The third subdivision of section 2,061 of the Code of Civil Procedure is but declaratory of the rule above considered, and by requiring a jury to distrust, necessarily authorizes them to reject all the testimony of such a witness in a proper case."

In that case defendant's counsel had asked the court to instruct the jury in the language of the Code, and the court had added the word "wilfully" before the word "false," and the contention in this court was as to the propriety of such addition, and it was held proper, and that "the word 'wilfully' did not change the effect of the instruction as offered." *People v. Soto*, 59 Cal. 367, and *People v. Hicks*, 53 Cal. 354, are to the same general effect.

The question involved in the present case is, however, somewhat different from the contention in those cited.

Here the law provides that a witness wilfully false in one part of his testimony *is to be distrusted*, not that the jury *may* or *may not* distrust his testimony, but they are to be told, that as matter of law, his testimony *is to be* distrusted. This distrust forms the basis or standpoint from which they must view his testimony, the standard by which to weigh his utterances. It

is true that notwithstanding this legal distrust which the law casts upon a witness wilfully false in a material part of his testimony, the jury may believe him upon other points — they are to be the sole judges as to that — there may be abundant reasons why they not only *may*, but why they should believe him in other particulars. The truth is not to be rejected, because it passes through a false medium, but as to the existence of the truth the jury is the sole judge.

The jury was told that in such cases a witness *may* be distrusted; the law says he *is to be* distrusted, that is, that he must be distrusted. A thing that *is to be*, *must be*. The distrust which is cast upon a witness wilfully false in a material part of his testimony is a presumption of law for the court, and with which the jury has nothing to do except to receive and act upon. It is a rebuttable presumption, to be overcome by facts and circumstances of which they are the sole judges.

The word “*may*” inserted by the court, was not synonymous with the “*is to*,” of the Code; it imported to the jury that they might or might not, at their option, distrust a witness, wilfully false in one portion of his testimony, when as matter of law they *must* distrust him, and may or may not, notwithstanding such distrust, believe him.

The law presumes every man accused of crime innocent until his guilt is shown. This is a presumption not to be acted upon or rejected by a jury at their will or pleasure. So a witness wilfully false is to be distrusted by a jury, and with this distrust as a factor in the problem, they may, they are at liberty to, believe or not to believe him in other particulars.

We think the court below erred in its modification of the instruction, and that for such error the judgment and order should be reversed and a new trial ordered.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

Hearing in Bank denied.

[No. 9721. In Bank.—August 27, 1885.]

ALBERT HEDGES ET AL., PETITIONERS, v. SUPERIOR
COURT OF YUBA COUNTY, RESPONDENT.

CONTEMPT—SUFFICIENCY OF AFFIDAVIT—VIOLATION OF INJUNCTION AGAINST CORPORATION—PROHIBITION.—An affidavit in contempt proceedings for the violation of an injunction restraining a corporation, its officers, agents, superintendents, managers, servants, and employees, from the commission of certain acts, did not state that the persons complained of were officers or servants of the corporation; but it did state that they knew of the issuance, service, and effect of the injunction, and violated it in contempt of the authority of the court. *Held*, on an application for a writ prohibiting the respondent from proceeding in the matter, that the affidavit was sufficient.

APPLICATION for a writ of prohibition. The facts are stated in the opinion of the court.

Cross & Simonds, for petitioners.

The affidavit being defective in not stating that the petitioners were officers of the corporation, the court had no jurisdiction over the contempt proceedings. (*Batchelder v. Moore*, 42 Cal. 412.)

E. A. Forbes, Stabler & Bayne, E. A. Davis, and I. S. Belcher, for Respondent.

The affidavit was sufficient, as it clearly shows that the petitioners wilfully violated the injunction with full knowledge that their act had been enjoined. (*Golden Gate Con. M. Co. v. Superior Court*, 65 Cal. 187.)

MYRICK, J. — Application for a writ prohibiting the respondent from proceeding in the matter of an alleged contempt committed by the petitioners. An injunction had been issued and served restraining a corporation, its officers, agents, superintendents, managers, servants, and employees from the commission of certain acts. The affidavit on which the contempt proceedings were based did not in terms state that the petitioners herein were officers, agents, superintendents, managers, servants or employees of the corporation; but it did state that they had full knowledge of the issuance, service, and effect of the injunction, that they worked the mine of the corporation, and that they did the acts complained of in violation of the injunction

and in contempt of the authority of the court issuing it. We cannot presume, for the purposes of issuing the writ prayed for, that the petitioners went upon the ground of the corporation without its authority and committed a trespass, and worked its mine "with a high hand;" but, rather that they went in and worked the mine with the consent and approbation of the owner; that their operations were permitted if not approved and authorized. Tested by the rules of law as to a writ of prohibition, we think the affidavit sufficient.

Writ denied.

MORRISON, C. J., MCKEE, J., and MCKINSTY, J., concurred.

[No. 11012. Department Two.—August 28, 1885.]

EMPIRE GOLD MINING COMPANY, RESPONDENT, v.
BONANZA GOLD MINING COMPANY, APPELLANT.

MINING CLAIM—TRESPASS—MEASURE OF DAMAGES.—The measure of damages in an action for trespass on a mining claim is the amount of money that will fully compensate the plaintiff for all detriment proximately caused by the trespass.

ID.—NOMINAL DAMAGES.—The trespass being proved, the law presumes nominal damages; and the defendant cannot justify his act, and obtain a verdict, by showing that the value of the ore extracted from the claim was less than the expense of extracting it.

EVIDENCE—IMPEACHMENT OF WITNESS.—Affidavits or letters of a witness which tend, although in a slight degree, to contradict his testimony, are admissible for that purpose.

COSTS—TAXING—ORDER—APPEAL.—An order on a motion to tax a cost bill, made after the rendition and entry of final judgment, can be reviewed only on a direct appeal therefrom.

APPEAL from a judgment of the Superior Court of Sierra County, and from an order refusing a new trial.

The facts are stated in the opinion.

John Gale, for Appellant.

Van Clief & Wehe, for Respondent.

SEARLS, C. — Action to recover damages for trespass upon a mining claim, and to obtain an injunction restraining defendant from the commission of like trespasses. Plaintiff had verdict and

judgment for \$5,000 and costs taxed at \$1,344.45. Of the sum taxed as costs, \$926 was for expenses of a survey made under an order of the court upon application of plaintiff and for its benefit. Defendant moved for a new trial which was denied, and the appeal is taken from final judgment and order denying motion for new trial.

Appellant claims that the verdict is unsustainable by the evidence, wholly inconsistent with the instructions of the court, and apparently given under the influence of prejudice and passion.

Plaintiff and defendant were the owners of adjoining mining claims, which were worked by drifting beneath the surface. Defendant had worked beyond its line and upon the claim of plaintiff. The damage sustained by plaintiff thereby was the problem which the jury was required to solve.

Those familiar with this character of mining will readily comprehend the difficulties in the way of determining the value of the material removed. The operations are mainly carried on through underground tunnels, drifts, and works not open to inspection, and to which the public has no access. The pay-dirt, as it is termed, usually of limited quantity, is removed to the surface to be washed, and in paying mines, being of large value compared with its bulk, is frequently washed by the owner, or some trusted agent, who alone can know with certainty the value of the proceeds. These and several other causes conspire to prevent the introduction by the party injured in such cases of testimony precise in character.

The most that can or should be demanded is to require such probative facts as best tend to illustrate and demonstrate the ultimate object in view. To the eye of the experienced miner, the appearance of the gravel with which he is entirely familiar may afford some indication of its value—its situation in the mine—whether upon or off the channel—near or remote from the bed-rock, the value of ground adjoining or in close proximity, are circumstances which with many others are proper to be considered by a jury and are frequently the best and only evidence within reach. If this class of circumstances, all converging on the very point at issue, tend to exaggerated results, it will generally be found that the party whose acts are complained of is possessed of all the necessary facilities for correcting the error.

In the case at bar there was a marked and substantial conflict in the testimony. Witnesses for defendant testified very positively to facts from which it would be reasonable to suppose the mining ground in question fell short of paying expenses, while on the part of plaintiff there was testimony tending to a state of facts in support of a larger verdict than was rendered by the jury.

Whether the jury deemed it improbable that defendant would have continued for some months to work the ground of its neighbor at a heavy loss to itself, or by what particular process they reached their verdict, we need not speculate, provided always there was ample testimony in support thereof.

With testimony thus conflicting, a jury composed as we may well suppose, in part at least of miners, was peculiarly qualified to deal, and we should not feel authorized to disturb their verdict merely because upon the face of the record we might feel like coming to a different conclusion.

Appellant seems to lay some stress upon the fact that the instructions of the court were of such a character as to demand a different verdict.

The only instruction asked by the plaintiff, so far as appears in the record, was to the effect that if the defendant entered upon plaintiff's claim, and dug and removed gold-bearing earth therefrom, the true measure of damages to plaintiff will be an amount of money which will fully compensate it for all detriment proximately caused thereby.

The instruction embodies the rule laid down by our Civil Code as the measure of damages for breach of an obligation arising upon contract. (Civ. Code, § 3300.)

No rule more favorable to the defendant could reasonably be asked.

The instructions given at the request of defendant from one to eight, both inclusive, were quite as favorable as ought to have been given, and one of them, the fourth, was entirely too favorable.

It was to the effect that if the jury found the necessary expense and cost of digging the gold-bearing earth and of extracting the gold therefrom, equaled or exceeded the value of the gold dust extracted, they should find for the defendant.

We do not think the question of trespass or no trespass is to be determined on the basis of profit and loss.

For every trespass upon real property the law presumes nominal damages. (*Atwood v. Fricot*, 17 Cal. 38.)

The instruction under consideration was probably based upon the rule as laid down in *Maye v. Yappen*, 23 Cal. 306, in which the court says:—

“The complaint in the case alleges that the defendants at divers times wrongfully entered upon a portion of plaintiff’s mining claim and extracted the gold and gold-bearing earth from a portion thereof, which gold and gold-bearing earth they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been \$2,000. No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the gravamen of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages in a case like the present is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. . . . In estimating these damages the expense of extracting the gold and separating it from the earth after it is first moved from its original location is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs.” This decision was affirmed in *Goller v. Fett*, 30 Cal. 482.

The complaint in this case is substantially the same as in *Maye v. Yappen*, and there is no disposition to question the doctrine enunciated in that case.

The rule cannot, however, be extended so as to entitle a defendant who has committed a trespass to justify his act and obtain a verdict by showing the value of the property taken to be less than the expense of its severance from the realty.

There was no error in the admission of the affidavit and letters of Southerland in evidence. He was superintendent of the corporation defendant, was a witness at the trial, had testified that he did not know he was working on plaintiff’s ground, and that he did not order the tunnels to be caved to prevent a survey.

The affidavit and letters tended in some slight degree to contradict his testimony, and to that extent and for that purpose were admissible.

Plaintiff filed a cost bill in the case including therein \$926, as costs and expenses of a survey made by plaintiff, and for its benefit under an order of the court. Judgment in the cause was entered August 11, 1884. On the 16th day of August, 1884, defendant gave notice of a motion to tax the costs on the ground that the items aggregating as above are not such necessary disbursements in the action as can be legally claimed as costs by plaintiff.

On the 15th day of September, 1884, the court entered an order as follows: "Motion to tax costs denied. Ordered that the costs of the survey are necessary disbursements, and that the costs will stand as taxed," which ruling is assigned as error.

It is objected on the part of plaintiff that the order of the court refusing to strike out items from the cost bill, being a special order and made after the rendition and entry of final judgment, is an appealable order, and cannot therefore be reviewed except by a direct appeal therefrom. Code Civ. Proc. § 956; *Calderwood v. Peyser*, 42 Cal. 112; *Clark v. Crane*, 57 Cal. 633, and *Dooly v. Norton*, 41 Cal. 441, are relied upon in support of the position taken.

This court had previously held in *Lasky v. Davis*, 33 Cal. 677, that an order made on a motion to retax costs is not appealable. It is not an order made after final judgment within the meaning of section 343 of the Practice Act, even though it be made after the entry of judgment, for in legal effect the order, if the motion is granted, amounts to a modification or amendment of the judgment, or in other words becomes a part of it.

If the motion is denied the error is none the less in the judgment, and can be reviewed only upon an appeal from the judgment. Costs are included in and constitute a part of the judgment, and hence, though ascertained and adjudged by the court after an entry of judgment by the clerk have been made, yet the law considers such action of the court as having preceded the final judgment.

In *Dooly v. Norton*, 41 Cal. 441, the court reviews the previous cases on the subject, and holds that an order made on motion to retax the costs in an action is a proper subject for review in some mode in this court.

If made before the judgment is rendered it may be reached by an appeal from the judgment, but if made after the entry of judgment it is an order after final judgment, from which as a special order an appeal will lie, thus virtually overruling *Lasky v. Davis*.

The reasoning in *Calderwood v. Peyser*, 42 Cal. 112, and *Clark v. Crane*, 57 Cal. 633, is in line with *Dooly v. Norton*.

The case of *Flubacher v. Kelly*, 49 Cal. 116, though referring to *Lasky v. Davis* with seeming approval, was really a case in which the motion to strike out a cost bill was made before the entry of judgment, and under all the cases could only be reviewed by an appeal therefrom.

A motion to tax a cost bill is a special motion, that is not a proceeding as of course in the cause, and an order thereon is a special order, and if made subsequent to the rendition and entry of final judgment can only be reviewed in this court by a direct appeal therefrom.

This rule is in harmony with the letter and spirit of the Code of Civil Procedure.

In appeals from final judgments the statement or bill of exceptions may be framed so as to include a review of all orders prior to the entry of judgment, but as to orders made subsequent to judgment, and which may and usually will require a special statement, and that too frequently after the time for statement on appeal has expired, the inconvenience in practice of treating them as included in the appeal from final judgment will be found a serious objection, to say nothing of trenching upon the true intent of the Code.

We think the objection of respondent to considering the question arising on the cost bill well taken. The judgment of the court below and the order denying defendant's motion for a new trial should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 20094. In Bank.—August 28, 1885]

THE PEOPLE, APPELLANT, v. JOHN RICHARDS,
RESPONDENT.

CONSPIRACY—ONE CONSPIRATOR MAY BE SEPARATELY PROSECUTED—INFORMATION.—In a prosecution for conspiracy, one conspirator may be separately informed against, tried, and convicted; and naming the co-conspirator does not render the information bad.

1D.—CONSPIRACY TO ROB.—A conspiracy to compel a third person to sign a bank check, and then to take it from him by force, is a conspiracy to rob.

APPEAL from a judgment of the Superior Court of Santa Clara County.

The facts are stated in the opinion of the court.

Attorney-General Marshall, Howell C. Moore, and J. H. Campbell, for Appellant.

Herrington & Bane, for Respondent.

McKINSTRY, J. — The Superior Court sustained a demurrer to an information which is in words and figures as follows:—

“In the Superior Court, etc.

“John Richards is accused by the district attorney of the county of Santa Clara, State of California, by this information, of conspiracy, committed as follows:—

“The said John Richards, on or about the 9th day of September, A. D., 1884, at the county and State aforesaid, did conspire with one David Davis, feloniously and by means of force and fear to take certain bank checks to and of the value of \$15,000 from the person and immediate presence of one Henry Miller, the owner thereof, against the will of said Henry Miller; and immediately theretofore, and for the purpose of said taking, to compel said Henry Miller, by means of force and fear, to draw, make, and sign said checks; and said defendant, in pursuance of said conspiracy, and to effect the object thereof, did on or about the date last named, proceed from the town of Hollister, in the county of San Benito, State of California, to the city of Gilroy in the county of Santa Clara, in said State, and did arm and disguise himself, and on the 13th of September, 1884, did set forth from said city of Gilroy along the road

leading therefrom to the certain place in the county last aforesaid, known as Pacheco Pass, there to lie in wait for said Henry Miller, and consummate the purpose of the said conspiracy, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the State of California."

From the judgment on demurrer the people appealed.

Counsel for respondent make the point: "There must be two persons at least, charged jointly *as defendants* in every information for conspiracy." And adds: "To the general rule there is this only exception—one can only be charged or convicted of conspiracy when he is charged to have conspired with persons 'unknown' or beyond the jurisdiction of the court."

As supporting the point, respondent cites Pen. Code, § 1160, n.; Russell on Crimes, §§ 492–548; 2 Bishop's Criminal Law, §§ 188, 189; 1 Bishop's Criminal Procedure, §§ 963, 964.

The note to section 1160 of the Penal Code merely lays down certain propositions, not necessarily involving the one here presented, and refers to adjudications (mentioned in the text-writers or directly cited by respondent) to sustain such propositions.

We have seen no edition of Russell on Crimes divided into *sections*. In the eighth American edition of that work (Davis & Metcalf) it is said: "From the nature of conspiracy it is an offense which cannot be charged to have been committed by one person alone. And upon this ground it has been holden that a prosecution for a conspiracy cannot be maintained against a husband and wife only," etc. (Vol. 2, p. 690.) No one can dispute, or has ever disputed, that the offense cannot be committed by one alone, and it would seem that the husband and wife were one in the sense that they could not conspire without the co-operation of another, at least.

Section 189 of 1 Bishop's Criminal Law does not bear upon the point, nor does section 188 help to solve the precise question. By way of *argument*, it may be said, *because* one cannot commit a conspiracy, or *because* when two are charged as defendants, the acquittal of one operates an acquittal of the other, therefore, the indictment must be against two persons, with the exceptions that one may be informed against if it be

stated in the information that the other conspirator is dead, or unknown, or out of the State. The argument may be given such force, if any, as it is entitled to. But the 188th section is cited by counsel as authority to the point that at least two *must* be charged "as defendants." It is enough to say that Mr. Bishop draws no such inference from the premises by him laid down.

Sections 963 and 964 of 1 Bishop's Criminal Procedure treat of "steps where private person prosecutes," and "steps if prosecuting officer." They do not speak of conspiracy at all.

At section 464, (Vol. 1), Mr. Bishop quotes Starkie: "An indictment for conspiracy cannot charge the offense against one only, for the very nature and essence of the crime exclude the idea of its commission by a single individual. But the indictment may allege that the defendant, *together with other persons*, committed the offense." Bishop adds: "So that even here there is no legal necessity for proceeding *jointly* against the two or more conspirators." And in section 225 of the Criminal Procedure (Vol. 2), the same learned writer very clearly intimates his opinion that, upon principal, when two or more conspirators are living and within the jurisdiction, one of them may be separately indicted. He says: "The conspirators may, as of course, be jointly indicted. Nor, if they are, will the court generally direct that they be separately tried. But if one of two dies, the living one may be indicted and tried, and it is the same of a known conspirator where the other is unknown, and probably, it is legally competent to indict known and arrested conspirators separately, while yet the court might interfere to correct so inconvenient and unusual a course." If one can be separately indicted, two being named in the indictment as conspirators, the *indictment* is sufficient as against demurrer, whatever action the court might assume to take to prevent the practice.

In support of his point respondent's counsel also cites 1 Wharton on Criminal Law, § 431; Wharton on Precedents of Indictments, 607-673; Wharton on Criminal Evidence, § 393.

At section 1388 of his Criminal Law, Dr. Wharton says: "A conspiracy must be by two persons at least; one cannot be convicted of it unless he has been indicted with persons to the

jurors unknown." And the same learned writer employs similar language in a note to the form No. 607, inserted in his precedents. As to Wharton's Criminal Evidence, here again there is some error in the citation. Section 393 does not relate to the subject.

In a note to the statement in section 1388, above quoted, Wharton cites 1 Hawk. ch. 72, and a large number of reported decisions. Assuming that by "Hawk. ch. 72," is intended 1 Hawkins' Pleas of Crown, ch. 72, it is there only laid down that under the statute, 21 Edw. 1, one person alone cannot be guilty of conspiracy; and therefore no prosecution under it was maintainable against a husband and wife only. (§ 8, p. 448.) Of the cases cited, *Regina v. Thompson*, 5 Cox C. C. 166, only holds that where an indictment charged that A, B, and C conspired together, with divers other persons to the jurors unknown, and no evidence was offered affecting other persons than A, B, and C, and the jury acquitted B and C, but found A guilty, A was entitled to an acquittal. In *Reg. v. Mulcachy*, 3 H. L. Cas. 306, the defendant was indicted with five other persons. Mulcachy demurred to the indictment, because the overt acts were not properly set out. The judgment of the court was that the objection was not sufficient in law to prevent the defendant from being compelled to plead to the indictment, and the House of Lords affirmed this judgment. In the course of an opinion Mr. Justice Willes said — what is everywhere admitted — that a conspiracy is (in the absence of statutory limitations), an agreement of two or more to do an unlawful act, or a lawful act by unlawful means. There is nothing in that case to uphold the view of counsel for the respondent in the case at bar. If *R. v. Denton*, cited by Wharton, is *Reg. v. Inhabitants of Denton*, 1 Dears. C. C., reserved, p. 3, it is merely to the effect that where an indictment is framed on an act of Parliament, and the act is repealed after the indictment and before plea pleaded, a judgment against the defendant must be arrested. *United States v. Lyman Cole et al.*, 5 McLean, 513, was a case in which twelve persons were indicted for conspiracy with one Filley, deceased. There is no intimation in the report bearing on the question now before us.

Commonw. v. Irwin, 8 Phila. 380, only determined that to justify a conviction on a count charging conspiracy, the jury

must be satisfied that there was an unlawful combination by the defendant with at least one other person.

In the note to section 1388 of Wharton's Criminal Law, in which the foregoing cases are cited, reference is made to section 305 of Wharton's Criminal Pleading and Practice, where it is said: "In an indictment for conspiracy, less than two cannot possibly be joined; a wife and husband together not being sufficient. . . . But it is clear that one defendant may be tried alone, when his co-conspirators are alleged to be unknown, or when such co-conspirators are *dead*, or *absent*, or *previously convicted*." From section 305 we are referred to section 755 of the same book. There the rule is laid down: "In riot or conspiracy there cannot be a conviction of a single defendant, coupled with an acquittal of co-defendants, unless there is an allegation and proof of the *co-operation of parties not indicted*." In a note to section 305, in addition to the case of *United States v. Cole*, reference is given to *Reg. v. Gompertz*, 92 Q. B. 824; *Com. v. Manson*, 2 Ashm. 31; *State v. Sam*, 2 Dev. 569, and *State v. Covington*, 4 Ala. 603.

In *Reg. v. Gompertz*, several persons were indicted together. It was held that, where all are convicted, if one shows himself entitled to a new trial on grounds not affecting the others, a new trial should be granted to all.

In *Com. v. Manson* the action of the court in denying a separate trial to one of two persons jointly indicted for a conspiracy was approved. *The State v. Sam*, 2 Dev. 569, is an interesting case, because of the able and learned opinion rendered. But there, too, the actual point decided was that on an indictment for conspiracy against two the acquittal of one is the acquittal of the other. Nothing is said in the opinion which directly sustains the view contended for in the present case, that an indictment cannot be sustained wherein the single defendant is charged to have conspired with another *named person*, unless it is averred that the latter is dead or out of the jurisdiction, etc. *The State v. Covington*, 4 Ala. 603, only holds that where several are indicted and found guilty of a conspiracy, a motion in arrest of judgment will be entertained at the instance of any one, although the others are not in court and may have escaped from custody.

In addition to the text-books above mentioned, counsel for

respondent also cites *Rex. v. Kinnersley*, 1 Strange, 193; *State v. Eagan*, 10 La. An. 698; *People v. Olcott*, 1 Am. Dec. 168; 2 Johns. Cases, 301, and *State v. McDonald*, 10 Am. Dec. 691; 1 McCord, 532.

Rex. v. Kinnersley decides that where two are indicted for a conspiracy and one only appears, and pleads to the issue, and is found guilty, judgment shall be given against him before the trial of the other. The Louisiana case holds that a judgment against one indicted for a riot with three co-defendants, and "divers other persons unknown" will not be arrested because his co-defendants were found "not guilty." *Non constat*, but he may have been guilty of a riot with the persons unknown.

It was held in *People v. Olcott* that where one of three persons, engaged in a conspiracy died before trial, and another was acquitted, the survivor might be tried and convicted.

State v. McDonald was a case where the indictment charged that McDonald and another, "together with divers other persons, to-wit, to the number of five," had committed the crime of riot. A motion in arrest of judgment was made "simply on the ground that the names of the others *should have been given*, or, if unknown, that fact should have been expressly stated." In South Carolina a riot could not be committed by less than three persons, and the court sustained the objection taken to the indictment, holding in effect that the names of the "others" should have been given, or their names declared to be unknown. We so understand that case. It is true the reporter states the indictment was against the defendant and *two* others, charging that they "together with other persons," etc. But it is also stated that the grand jury found a true bill against the defendant "and *one other only*." If the statements could be construed to mean that the two indicted were charged to have committed the riot with a third person *named*, "together with others," etc., the objection to the indictment would not have been sustained, because the name of a third person was given.

In the last case the court said: "The names of third persons, if they are necessary to the constitution of the offense, or constitute a necessary part of its description, should, if known, be *inserted*." In a note the compiler adds: "If several be indicted for a riot, and the jury acquit all but two, they must acquit them

also, unless it be charged in the indictment that these committed the riot, together with some other person *not tried on that indictment.*" (But to prevent misapprehension, see Penal Code of California, § 404, which makes it possible for *two* persons to create a riot.)

It has sometimes been said that if an indictment charges a conspiracy against a defendant committed with a person unknown, and the third person was in fact known, the prisoner must be acquitted. (*State v. McDonald, supra*; Chitty's Criminal Law, 212.)

But in *People v. Mather*, 4 Wend. 230, 21 Am. Dec. 122, it was held that if the co-conspirators are stated to be unknown, the indictment is good, even although the names of the co-conspirators must actually have been known to the grand jury.

We have endeavored to go over carefully all the cases cited by respondent or by the writers to whom he has referred. Of course it is possible that we have failed to notice isolated expressions in the opinions of judges which might be deemed to favor the view of counsel, but we are not conscious of having overlooked such expressions. In no one of the cases however was it decided that an indictment against one charged as a conspirator was defective because the name of the third person, with whom the defendant was charged to have conspired, was given in the indictment. If there were no precedents for an indictment or information against one in which he was charged with another named person, the respondent would be entitled to the benefit of any inference which could fairly be drawn from that circumstance. But when a case is only new in instance, but not new in principle, the mere failure to discover a precedent in which the principle was applied to exactly the same facts is of little weight or consequence. (*Pasley v. Freeman*, 3 Term Rep. 63; *Ashby v. White*, 1 Smith's Leading Cases, Hare and Ws. notes, 440, 441.) And as we have seen the styling one as "Unknown" has been held sufficient, although the name of the person was in fact known to the grand jury. (*People v. Mather, supra.*) This must be construed to be an adjudication that a grand jury is not bound to join as defendants in one indictment all those who are known to them to have joined in the same conspiracy.

Clearly the information states facts (assuming that the nature of the conspiracy itself is sufficiently averred) which show that

the defendant has been guilty of the offense. It requires two to conspire, but if two have conspired each is guilty of the conspiracy. True if the name of one is unknown, his name cannot be inserted in the indictment. But where such person is designated as "unknown" a particular individual is thus indicated; he is the person who is alleged to have joined with the defendant in the acts constituting the conspiracy. It is difficult to understand upon what ground the defendant can complain if the alleged co-conspirator is more distinctly identified by giving his name. As was said in *People v. Mather*, "an indictment should contain so much certainty as clearly to designate not only the particular kind of offense, but the specific criminal act for which the accused has to answer." But there and elsewhere it has been held that the defendant was sufficiently informed of the person with whom he was accused of conspiring when such person was charged to be *unknown*.

The alleged co-conspirator not indicted is a "third person," whose existence is necessary to the completion of the offense, and who must always be described with reasonable certainty; as in robbery, the person robbed; in larceny, the person whose property is alleged to have been stolen. In case of conspiracy there must have been another person without whose co-operation the defendant informed against could not have committed the crime. Such person must be identified by name or otherwise in such manner as that the defendant may know with what offense *he* is charged.

It may be urged that there is a species of injustice in selecting for prosecution one of two averred to be equally guilty, when for aught that appears both might have been prosecuted. But is this a matter of which the single defendant ought to be permitted to complain? As we have seen it has been held that where two are indicted one may be prosecuted to judgment before the trial of the other. We need not here consider the consequences in case the other shall subsequently be acquitted. We are asked to assume that both are within the jurisdiction of the court, because the information does not affirm that the conspirator died before the filing of the information, or that he had withdrawn from the State. Even if this should be conceded, we cannot see why this should relieve the defendant from pleading

to an information which gives him full notice of the facts, which if they exist, establish *his* guilt of the offense.

Counsel for respondent says: "There must be two men at least *convicted* (subject to the exception as to death, etc.) before the conspiracy is established," citing *Dreux v. Domec*. 18 Cal. 83; *Commonw. v. Cobb et al.* 14 Gray, 57; 2 Russell on Crimes, p. 490; *State v. Buchanan*, 5 Har. & J. 317; 9 Am. Dec. 534; Wharton's *Crim. Ev.* 8th ed. p. 392; Barbour's *Crim. Law*, p. 248.

Russell at the page referred to treats of "forgery." Wharton at the page referred to treats of the competency of the wife of one defendant to be a witness against another defendant. *Dreux v. Domec*. 18 Cal. 83, was an action for malicious prosecution. We are unable to see what bearing *Commonw. v. Cobb et al.* 14 Gray, 57, has upon the proposition of counsel, and except that *State v. Buchanan*, 9 Am. Dec. 534, was a prosecution for conspiracy, that case seems to have no relation to the proposition here asserted.

None of the cases last cited are to the point that the conspiracy cannot be established *as against the one indicted* who is charged to have conspired with another not indicted.

Barbour in his *Criminal Law*, p. 248, speaks of conspiracy, but seems to add nothing to what has already been said with respect to the precise point under consideration.

In *Adams v. The People*, 9 Hun, 89, the indictment charged that Adams, the sole defendant, "conspired with one Lamb" to defraud. Lamb had been previously convicted of the same offense, but this did not appear on the face of the indictment, but was only shown as a fact when Lamb was offered as a witness for the prosecution. The court held him competent as he had been convicted of a misdemeanor, not of a felony. Adams was separately indicted, tried and convicted. No objection was taken to the indictment by demurrer or in arrest of judgment.

We are not, however, without the authority of adjudications directly sustaining the course pursued by the district attorney in the present case. In *Heine v. Commonw.* 91 Pa. St. 145, Heine was charged with having "with one Henry Weile conspired" etc. The objection was taken that Heine alone was charged. The court said it is strictly true that a conspiracy is in its nature joint, and that one alone cannot be guilty of the

offense: "Nevertheless one of two or more conspirators may be separately indicted, tried and convicted. (3 Chitty's Criminal Law, § 1141.) Therefore, that Weile has not been indicted with Heine can make no difference, if it sufficiently appears from the record that he was a confederate."

In *United States v. Miller*, 3 Hughes C. C. 553, the information charged a conspiracy by three persons, Miller, Lee, and Gettslick. Lee was dead, and Gettslick was already under conviction "for an act committed in furtherance of the conspiracy charged." The learned judge said: "It is not the practice of the government to prosecute any person to conviction for more than one of the same *series of offenses*. Hence, *there is no indictment here* except against Miller. . . . The particular question arising on demurrer, therefore, is will an information against him alone lie without joining Gettslick. . . . As there may thus be a severance in the trial, in the verdict and in the judgment, we may conclude there may also be a severance in an indictment for a conspiracy, unless there be some reason peculiar to such an indictment plainly making the several proceedings improper. I can see no such reason. It will not do to say that because two at least must be convicted of a conspiracy, and that one person who should be the only one convicted must be discharged, therefore two at least must be joined in the indictment. But that same reasoning would forbid the severance of the trial, and deprive any one of his right to be tried alone. If it be conceded that there may be a severance in trial of persons jointly indicted for a conspiracy, it follows, as far as the reason just alluded to is concerned, that there may likewise be a severance in the indictment. Some of the text-writers say (*arbitrarily*) that indictments for conspiracy must be joint; but they give no reason, other than the one just stated for their proposition, and it is difficult to find a reason. I do not think any sufficient reason exists."

The learned judge then proceeds to examine *United States v. Cole*, *People v. Matthew*, *Rex v. Kinnersley*, and *Rex v. Nichols*, 13 East, 412. He finds nothing in those cases which would prohibit the indictment of one of two known conspirators.

Our conclusion upon the point is that the information is not insufficient, because it is against a single defendant, and the *name*

is given of the person with whom he is charged to have conspired. In addition to the objections above considered, respondent claims that no crime is charged, inasmuch as a conspiracy to compel one to sign a bank check and then to take it from him by force is not "a conspiracy to rob." "Robbery is the taking of personal property from the person of another by means of force." (Pen. Code, § 211.) "Personal property" includes things in action and evidence of debt. (Pen. Code, § 7.) It is a *conspiracy* to rob, even although the conspiracy include an agreement to compel the making of the checks which are to be taken by force from the person. It is part of the unlawful agreement that a robbery shall be accomplished.

Judgment reversed and cause remanded with direction to the court below to overrule the demurrer and to require the defendant to plead to the indictment.

MORRISON, C. J., MYRICK, J., ROSS, J., and THORNTON, J., concurred.

McKEE, J., concurred in the judgment.

[No. 9349. In Bank.—August 28, 1885.]

EDWARD C. WILSON, RESPONDENT, v. S. A. BARNARD
ET AL. S. C. FARNHAM, APPELLANT.

LOGGER'S LIEN—ACTION TO ENFORCE—COMPLAINT.—In an action to enforce a logger's lien, under the Act of March 30, 1878, as amended by the Act of April 12, 1880, the complaint must allege that something was due from the defendants to the original contractor when the lien of the plaintiff was filed, or that the defendant was notified or had knowledge of the claim of the plaintiff prior to the payment in full of the amount due to the original contractor under the contract.

APPEAL from a judgment of the Superior Court of Butte County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Gray & Sexton, for Appellant.

The complaint should have shown that something was due to the original contractor at the time of filing the lien. (*Renton*

v. *Conley*, 49 Cal. 187; *Wells v. Cahn*, 51 Cal. 423; *Dingley v. Greene*, 54 Cal. 333; *Rosenkranz v. Wagner*, 62 Cal. 151; *Latson v. Nelson*, 11 Pac. C. L. J. 589; *Whittier v. Hollister*, 64 Cal. 283.)

Gale & Jones, for Respondent.

Ross, J.—This action was brought to enforce a lien alleged to have accrued under and by virtue of the provisions of the act approved March 30, 1878, entitled “an act giving a lien to loggers and laborers employed in logging camps, upon the logs cut and hauled by the persons who employ them,” as amended by the act approved April 12, 1880. (Stats. 1877–78, 747; Stats. 1880, 38.)

The first point made for the appellant, which we think must be sustained, is that the complaint does not state facts sufficient to constitute a cause of action. In *Rosenkranz v. Wagner*, 62 Cal. 151, and in other cases in this court, it was held that because of the failure of the complaint to allege that anything was due from defendants to the original contractor when plaintiff's lien was filed, or that defendants were notified or had any knowledge of the claim of plaintiff prior to the payment in full of the amount due to the original contractor under the contract, that there was a failure to state a cause of action. But it is contended on behalf of the respondent that the decisions under the Mechanics' Lien Act are inapplicable to cases arising under the Loggers' Lien Act, because by the latter act it is provided that the liens given “shall take precedence of other claims” for the period of thirty days after the logs or lumber arrive at the place of destination, etc. But, manifestly, the giving of precedence of one class of liens over all other claims does not extend the liability of the party against whom all of the liens and claims go; that is to say, the owner of the property sought to be charged. The contracts of material-men and laborers with the original contractor are made with reference to his contract with the owner, and in subordination to its terms. (*Dingley v. Green*, 54 Cal. 336.) It results that the owner cannot be charged beyond the contract price. (*Latson v. Nelson*, 11 Pac. C. L. J. 589; *Whittier v. Hollister*, 64 Cal. 283.) In the brief of counsel

for plaintiff it is said that Barnard & Co., who were the contractors and who employed the plaintiff to work, "were converting trees on appellant's land into lumber, and after transporting, scaling, measuring, and marking the same, would, if quality and all things were satisfactory to appellant, receive an agreed price per thousand feet"; and that plaintiff's lien was filed against certain lumber prior to its delivery and prior to the payment by appellant of the agreed price therefor. The *complaint* contains no such averment with respect to payment, for which reason the demurrer thereto should have been sustained.

Judgment and order reversed and cause remanded, with directions to the court below to sustain the demurrer to the amended complaint, with leave to the plaintiff to amend further.

MORRISON, C. J., MYRICK, J., THORNTON, J., and MCKINSTRY, J., concurred.

McKEE, J., dissenting. — I dissent. The action is an attachment suit for recovery of the value of personal services rendered by the plaintiff in cutting standing timber upon land claimed by the defendant Farnham, and in hauling and driving saw logs and lumber from the land to his saw-mills, and to foreclose a logger's lien.

The lien was filed upon a quantity of lumber which the plaintiff had "cut, sawed, hauled, and driven" to a saw-mill on the land of Farnham. This lumber had been cut, etc., by the plaintiff for and under the directions of the defendants Barnard & Co., who had a contract with the defendant Farnham, under which they were authorized to enter upon Farnham's land and cut the standing timber thereon, for the purpose of converting the same into lumber, which, when "scaled, marked, and measured," Farnham agreed to purchase from them, at a certain price per thousand feet, payable when the lumber was delivered "scaled, marked, and measured," to him at his saw-mills upon his ranch.

In the execution of the contract Barnard & Co. hired the plaintiff as a "logger," but they failed and refused to pay him his wages, which amounted to several hundred dollars; and, as security for the payment of what was owing to him, he filed a

logger's lien upon the lumber at the logger's yards on Farnham's ranch, where it lay unscaled, unmarked, unmeasured, and undelivered; and seasonably, after the filing of the lien, he commenced his attachment suit.

The lien was filed and the attachment suit commenced under the provisions of an act of the legislature approved March 20, 1878, entitled "an act giving a lien to loggers and laborers." Section 1 of the act reads as follows:—

"A person who labors at cutting, hauling, rafting, or drawing logs or lumber, shall have a lien thereon for the amount due for his personal services, which shall take precedence of all other claims, to continue for thirty days after the logs or lumber arrive at the place of destination for sale or manufacture," etc.

It is not claimed that this statute is unconstitutional; nor is it claimed that any of the steps taken by the plaintiff for the creation of the lien is contrary to the requirements of the statute. But conceding all these, the contention is made, that as Farnham did not owe Barnard & Co. any money on account of the contract under which the lumber was made at the time of the filing of the lien, the plaintiff had no lien to be enforced.

A "logger's lien" is an entirely different thing from a "mechanic's lien." The latter is given by statutory law upon real property of which the person, for whom the improvement is made, is, or claims to be, the absolute owner; and as he contracts under the Mechanics' Lien law, which enters into his contract, for the improvement of his property, he is bound to the extent and according to the terms of his contract, and his property is charged for the payment of the indebtedness contracted to the several parties who, under the law, have rights in it; and he can do no act to impair those rights; therefore he is not bound to pay, unless there is money due and owing at the time of availing of those rights. Such were the cases of *Rosenkranz v. Waggoner*, *Dingley v. Green*, *Latson v. Nelson*, and *Whittier v. Hollister*, cited in the prevailing opinion.

Here, however, there is no lien claimed, or sought to be enforced, upon the real property of Farnham. It is a lien upon personal property, in which Barnard & Co. had an absolute or qualified ownership; and for the purpose of the logger's law and lien it matters not whether they were absolute or qualified

owners—they were the owners of the property; and by the terms of the contract between them and Farnham, Farnham merely reserved to himself, as a preferred purchaser, the right to buy from them, at a stipulated price, when the lumber was delivered at his saw-mills, scaled, marked, and measured. But the lumber was not scaled, nor marked, nor measured, nor delivered to Farnham. Farnham therefore had neither possession of it nor title to it. The lumber was in the actual or constructive possession of Barnard & Co., and the plaintiff who had expended his labor upon it. A constructive possession is sufficient for a logger's lien; therefore the plaintiff, in my judgment, had an unquestionable right to create and perfect a lien upon the lumber, whether Farnham was or was not indebted to Barnard & Co. at the time.

The right to such a lien does not depend upon an indebtedness by the owner of land to persons whom he has authorized to cut and remove timber growing upon it, and to manufacture the same into lumber, by a special contract for that purpose. It rests upon property in the debtor, and possession, actual or constructive, in the lienor. The statute authorizing the lien to be created and filed is but the legislative expression of the common-law right of every workingman to retain possession of personal property upon which he has bestowed labor, which has changed the property and increased its value. Having possession, actual or constructive, the artisan or laborer has the right to retain it, or to create a lien upon it, according to the statute, without reference to any contractual relation between his employer and others as to the property. Any claims arising out of such relations are made, by the statute, subordinate to the superior claim and right of the laborer to his lien upon the property for the services which have made it valuable.

I think the judgment of the court for the enforcement of the lien should be affirmed.

[No. 20087. In Bank.—August 28, 1885.]

THE PEOPLE, RESPONDENT, v. EDWARD LANGTON,
APPELLANT.

CRIMINAL LAW—MURDER—INSTRUCTION—PRESUMPTION AS TO INTENTION.—In a prosecution for murder, the court instructed the jury that "every person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the deceased; and unless the defendant can show that his intention was other than his act indicated, the law will not hold him guiltless." *Held*, that the instruction was proper.

ID.—DRUNKENNESS OF DEFENDANT.—As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry.

APPEAL from a judgment of the Superior Court of Sierra County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Van Clief & Wehe, for Appellant.

The fact of the drunkenness of the defendant should have been considered for the purpose of ascertaining whether or not the unlawful intent which is a necessary element of the crime of murder existed. (*People v. Harris*, 29 Cal. 678; *People v. Ferris*, 55 Cal. 588; *People v. Eastwood*, 14 N. Y. 562; *Roberts v. People*, 19 Mich. 401; *McIntyre v. People*, 38 Ill. 514; *Golliher v. Com.* 2 Duval, 163; *People v. Robinson*, 2 Parker, Cr. C. 235.)

Attorney-General Marshall, and *Stanley A. Smith*, for Respondent.

The intoxication of defendant was not a matter of inquiry. (*People v. Nichol*, 34 Cal. 211; *People v. Belencia*, 21 Cal. 544; *People v. Lewis*, 36 Cal. 531; *People v. Williams*, 43 Cal. 345; *People v. Ferris*, 55 Cal. 592; *People v. Jones*, 63 Cal. 168; Wharton's Criminal Law, §§ 35, 39; 1 Bishop's Criminal Law, §§ 400, 401, 409; Wharton on Homicide, §§ 588, 589.)

MORRISON, C. J.—Defendant was prosecuted for the crime of murder, and was convicted of murder in the second degree. On the trial of the case in the court below the following instruction was given to the jury:—

"Every person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the deceased; and unless the defendant can show that his intention was other than his act indicated, the law will not hold him guiltless."

"Unless the defendant can show that his intention was other than his acts indicated, the law will not hold him guiltless," is the portion of the instruction which struck us at first view as erroneous. It might be claimed that the defendant was required to show by evidence adduced by himself what his intention was, even though the fact appeared from evidence introduced by the prosecution that there were circumstances of mitigation or facts which reduced the crime as provided by section 1105 of the Penal Code. But on reflection we have concluded that such is not the proper meaning of the instruction. The words "unless the defendant can show," mean unless he can or does show from the whole evidence in the case, thus bringing himself within the meaning of the above section of the Code. It would be a strained construction of the language of the instruction to hold that the court meant or intended the jury to understand that the evidence must come from the defendant, and that they could not consider the whole evidence in the case as showing circumstances of mitigation or facts tending to reduce the degree of the crime or even to excuse or justify the same.

The appellant also complains of the second instruction which is as follows: "As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation," etc.

But is it true that drunkenness does form a legitimate matter of inquiry as between murder in the second degree and manslaughter? The trial court told the jury that it did not. The question is not a new one in this court. In the case of *People v. Nichol*, 34 Cal. 215, the court below charging the jury in a case of homicide said: "As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful

killing of a human being without malice, express or implied, and without any admixture of deliberation." The defendant was convicted, and the judgment was affirmed by the Supreme Court. The instructions were quite numerous, including the one referred to, and speaking of them, Judge Sanderson delivering the opinion of the court said: "They are not even obnoxious to criticism." In the case of *Pirtle v. The State*, 9 Humph. 663, the Supreme Court of Tennessee says: "As between the two offenses of murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry; the killing being voluntary, the offense is necessarily murder in the second degree unless the provocation was of such a character as would at common law constitute it manslaughter, and for which latter offense a drunken man is equally responsible as a sober one." The case named is cited with approval by the Supreme Court in *People v. Belencia*, 21 Cal. 546, and the instruction in the case we are now considering is fully sustained by these authorities.

We find nothing in the record which calls for a reversal of the judgment, and therefore the same is affirmed, as is also the order denying a new trial.

MYRICK, J., ROSS, J., and THORNTON, J., concurred.

[No. 11052. In Bank.—August 28, 1885.]

EEL RIVER AND EUREKA RAILROAD COMPANY,
APPELLANT, v. WATERMAN FIELD, RESPONDENT.

EMINENT DOMAIN—RAILROAD—RIGHT OF WAY.—In a proceeding to condemn land, a railroad corporation, under section 465 of the Civil Code, has power to acquire a right of way in accordance with the most advantageous route for its road; and the taking for such purpose is not rendered unnecessary by the fact that it had previously purchased a less advantageous right of way over the land of the defendant.

APPEAL from a judgment of the Superior Court of Humboldt County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

S. M. Buck, and Cope & Boyd, for Appellant.

W. H. Brumfield, for Respondent.

Ross, J. — The plaintiff, a corporation organized under the laws of this State for the purpose of building and operating a railroad from a point on the Van Duzen River to the city of Eureka in Humboldt County, seeks by this proceeding to condemn a right of way for its road over the land of defendant. The answer of defendant put in issue the alleged necessity for taking the land in question, and upon this issue the court below found in favor of defendant, and accordingly gave judgment against the plaintiff. It is contended here that the evidence is insufficient to sustain the finding.

It appears that one R. F. Herrick, at the instance of the plaintiff, made a preliminary survey for the line of its road through that portion of the land of the defendant described as "west of the dyke," and defendant sold to the plaintiff a right of way four rods in width for its road over that part of his land "granting to said company the right to pass and re-pass with its rolling stock, freight, and passenger cars, to construct and maintain side tracks, switches, turn-tables, and warehouses; the said grant of right of way to continue and be in force so long as the said company shall continue to maintain and operate its road and no longer." But the line of the road as finally located ran through another portion of defendant's land, and it is over that portion of the land embraced in the line as finally located that the plaintiff seeks to acquire the right of way by means of these condemnation proceedings. The plaintiff's engineer testified at the trial that "it was necessary to locate the line as described in the complaint herein across the defendant's land because it is the best line, the most economical to construct, and the most practicable route for running a line through that land. It is the shortest line; it has less curvature than any other line, and the road being a very important one (may be a through line) it is necessary to consider very carefully the best line to be run through defendant's land."

The engineer who ran the preliminary line testified: "The difference between the line described in the complaint and the

one I surveyed consisted in this: The one I surveyed west of the dyke was of greater length, had a very short curve; there may be considerable difference in cost of two routes, as the line in the complaint described is high enough to avoid the necessity of throwing up an embankment. I could not say what the difference in cost would be. The route they have located is the shortest, still the other route would accommodate their business, and it looks to me better than the one they seek now. It is nearer their landing."

The testimony of the witness F. E. Herrick is of but little consequence, as he admitted that he had made no survey of the routes, but that his examination was confined to the map, and his experience in railroad building was confined to two logging roads—one a quarter of a mile and the other one mile in length.

The basis of the action of the court below in finding that the land in question was not necessary to be taken for the purposes of the road was the fact that the plaintiff had previously acquired, and still held by purchase, a right of way across defendant's land west of the dyke, "which will enable the plaintiff to accomplish the object for which it is incorporated, and discharge every duty it owes to the public."

By section 465 of the Civil Code it is declared that:—

"Every railroad corporation has power:—

"1. To cause such examination and surveys to be made as may be necessary to the selection of the most advantageous route for the railroad; and for such purposes their officers, agents, and employees may enter upon the lands or waters of any person subject to liability for all damages which they do thereto. . . .

"4. To lay out its road, not exceeding nine rods wide, and to construct and maintain the same, with a single or double track, and with such appendages and adjuncts as may be necessary for the convenient use of the same. . . .

"7. To purchase lands . . . to be used in the construction and maintenance of its road, and all necessary appendages and adjuncts, or acquire them in the manner provided in title 7, part 3, of the Code of Civil Procedure, for the condemnation of lands; and to change the line of its road, in whole or in part, whenever a majority of the directors so determine, as provided hereinafter; but no such change must vary the gen-

eral route of such road, as contemplated in its articles of incorporation. . . ."

The next section provides:—

"Every railroad corporation in this State must, within a reasonable time after its road is finally located, cause to be made a map and profile thereof, and of the land required for the use thereof, and the boundaries of the several counties through which the road may run, and file the same in the office of the secretary of State," etc.

By section 467 it is provided: "If at any time after the location of the line of the railroad and the filing of the maps and profiles thereof, as provided in the preceding section, it appears that the location can be improved, the directors may, as provided in subdivision 7, section 465, alter or change the same, and cause new maps and profiles to be filed, showing such changes, in the same offices where the originals are on file, and may proceed, in the same manner as the original location was acquired, to acquire and take possession of such new line, and must sell or relinquish the lands owned by them for the original location within five years after such change. No new location as herein provided must be so run as to avoid any points named in their articles of incorporation."

It will be observed that by the provisions of the last section that even after the line is once finally located and the map filed as required by section 466, if it appears that the location can be improved the directors may, in accordance with the provisions cited, alter or change the route, and may proceed in the same manner as the original location was acquired, to acquire and take possession of such new line, being required to sell or relinquish the lands owned by them for the original location, within five years after such change. But here the effort is to condemn land embraced within the line as first finally located and as shown by the map filed by the plaintiff in accordance with the provisions of section 466 of the Civil Code. There is no substantial conflict in the evidence upon the proposition that the line as finally located and within which the land sought to be taken falls, is the shortest, best, and most economical, and therefore the most practicable route. The mere fact that the plaintiff had, after its preliminary survey, acquired a right of

way over another portion of defendant's land over which it might, though at less advantage, build its road, does not render the taking unnecessary; for, as has been seen, railroads are, under our statute, empowered to alter or change their route even when once finally located, whenever the location can be improved. In the present case the right of way granted the plaintiff by defendant was conditional, and by the terms of the deed will cease to exist when plaintiff's road is constructed elsewhere. We are of opinion that the evidence is insufficient to sustain the finding of the court below.

Judgment and order reversed and cause remanded for a new trial.

MORRISON, C. J., MYRICK, J., THORNTON, J., MCKEE, J., and MCKINSTRY, J., concurred.

[No. 9717. Department Two.—August 29, 1885.]

CITY OF LOS ANGELES, RESPONDENT, v. SOUTHERN PACIFIC RAILROAD COMPANY, APPELLANT.

TAXATION—MUNICIPAL GRANT—LICENSE TAX.—The grant by the city of Los Angeles to the defendant of the right to maintain and operate its road within the city limits, *held*, not to exempt it from the payment of the license tax imposed upon steam railroads carrying on their business within the city.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order refusing a new trial.

The facts are stated in the opinion.

Glassell, Smith & Patton, for Appellant.

The ordinance imposing the license upon the defendant is in contravention of the terms of the contract between it and the plaintiff, and therefore void. (Const. U. S. art i. § 9; *City of Los Angeles v. Los Angeles City Water Co.*, 61 Cal. 65; *Mayor etc. v. Second Ave. R. R. Co.*, 32 N. Y. 261; *Mayor etc. v. Third Ave. Co.* 33 N. Y. 42; *State v. Mayor*, 33 N. J. L. 282; *North Hudson R. R. Co. v. Hoboken*, 41 N. J. L. 78; *Youngblood v. Sexton*, 32 Mich. 406.)

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J. W. McKinley, for Respondent.

The grant of the right of way and other property in the city of Los Angeles did not exempt the defendant from the license tax. (*Frankford R. R. Co. v. Philadelphia*, 58 Pa. St. 119; *San Jose v. S. J. & C. R. R. Co.* 53 Cal. 476.) The intention to exempt from such taxation must clearly appear, and will not be inferred. (*Second Municipality of N. O. v. N. O. R. R. Co.* 10 Rob. (N.Y.) 1; *Pacific R.R. Co. v. Cass Co.* 53 Mo. 27; *Orange & A.R. R. Co. v. Alexandria*, 17 Gratt. 182; *Erie Ry. Co. v. Commonw.* 66 Pa. St. 86; *B. & O. R. R. Co. v. Supervisors*, 8 W. Va. 331.)

SEARLS, C.—This action was brought to recover \$1,220 alleged to be due for license tax. Plaintiff had judgment. Appellant does not here challenge the authority of plaintiff to provide by ordinance for the collection of a license tax upon business and occupations carried on within the corporate limits of the city of Los Angeles, including such license tax, “for every steam railroad company having depot in said city.”

The validity of the ordinance upon which this action is founded was passed upon in the case of *City of Los Angeles v. Southern Pacific Railroad Company*, 61 Cal. 59.

The points made here, and which, it is claimed, were not involved in the case quoted above, are:—

1. That by virtue of an ordinance of the City of Los Angeles, approved October 24, 1872 an ordinance of the board of supervisors of Los Angeles County, and an agreement of defendant therein referred to, and certain other ordinances relating to the same subject-matter, a contract between the parties, plaintiff and defendant, was created, by the express terms of which it became the duty and right of defendant to establish its depot, and to maintain and operate its railroad in and through the city, and that the subsequent deed and ordinances of the city relating thereto constituted an express grant to the defendant of the right to maintain its depot and operate its road without any further license from the city.

2. That the ordinance imposing a license upon the defendant is in contravention of the terms of this contract, and impairs its obligation, and is therefore void as against defendant.

From a review of the findings of the court below, and of the evidence upon which those findings are based, we conclude the city of Los Angeles and the county of Los Angeles were alike desirous that the defendant corporation should construct its railroad through the county, and locate its depot and shops within the city limits, and that as an inducement thereto they and each of them were willing to make, and did make concessions in the way of bonds and stock, and that the plaintiff granted certain lands needed by the corporation defendant, and granted to it free "any and all right of way which said Southern Pacific Railroad Company may require in entering, passing through and leaving the said city with the main trunk line, be secured to them free of any claim for damages or other compensation."

The court below finds that "the plaintiff, for a valuable consideration rendered by the defendant, granted to the defendant the right to construct its road, depots, workshops, in said city, and to operate the same and to carry on its business connected with said road and depots in said city; but by virtue of said ordinances and contract the defendant has not the free nor unrestricted right to operate its said roads, depots or workshops, or carry on its said business within said city, free from any tax, license, or other impositions from said city."

This further fact is found: "The court further finds that there was no consideration paid or contracted to be paid by the defendant to the county or city, or either of them, to the plaintiff for exemption from taxation."

If there is anything in the evidence which can be said to militate against the two findings above set out, it must be found in the ordinance which provides that, in consideration of the benefits and advantages conferred upon and derived by the city by the location of the passenger and freight depots for the Los Angeles City station of the main trunk line of the Southern Pacific Railroad within said city, etc., the city assigns certain stock to the defendant, and at the same time provides that the defendant shall not, as a consideration for such stock, be required to locate and build its depots and run the road to the same unless there shall be deeded to the company certain lands for depot purposes, and certain other land for workshops and other buildings.

Or in the ordinance approved July 26, 1873, entitled:—

“An ordinance providing a free right of way for the Southern Pacific Railroad through the city of Los Angeles.”

The ordinance, after reciting that by a certain ordinance passed October 24, 1872, the city was obligated to give to defendant a free right of way through the city for its road, and that the defendant had selected certain streets, proceeds to set apart and dedicate to the unreserved and unrestricted use of defendant such streets, for a right of way, and to grant to defendant the right of way over the same, for the uses and purposes of its road, etc.

We fail to find in this testimony anything in conflict with the facts as found by the court.

The city was the owner, as we suppose, of certain lands and personal property, which it was willing to convey to defendant, provided it would build its road through the city, and build its depot and workshops therein, and the former was also willing, as a further inducement, to grant a right of way through the city to defendant for its road, free from all expense or damage.

It does not follow that the business of the defendant, when established and prosecuted, or its property, were to be free from the burdens of taxation or exempt from such license tax as might lawfully be imposed upon other persons owning like property and using it in like manner.

There was a contract between plaintiff and defendant. It related to the manner of acquiring certain property and easements.

It did not, however, confer upon the grantee any rights, privileges, exemptions, or immunities in the ownership or use of the property to which it would not have been entitled, had it purchased the same property, at private sale from an ordinary citizen, or condemned and paid for it, under the right of eminent domain.

The case of *The City of Los Angeles v. The Los Angeles Water Company*, 61 Cal. 65, is not in point.

There the plaintiff entered into an agreement with the predecessors in interest of the defendant, by which for an annual rent reserved and other considerations, defendant, the holder of a lease of plaintiff's water-works as assignee, had a right to sell

and distribute water for domestic purposes, and to receive the rents and profits to its own use.

The right to sell water and carry on the business of selling and distributing water for profit was granted by plaintiff, and an ordinance imposing a license tax upon all persons vending water for domestic purposes was held invalid against defendant upon the ground that plaintiff, under its contract, had already reserved a sum to be paid by defendant for the privilege of vending water for domestic purposes, and could not, during the term of the lease, increase the amount to be paid for the privilege granted.

The present case differs from that in this — there plaintiff had received a consideration for a *privilege granted* — here no privilege had been granted to carry on a business, and no compensation had been received for any such grant.

Plaintiff had granted a right of way and conveyed certain property, as any private owner of such property might have done, nothing more.

This did not, as we think, constitute such an express grant to defendants of the right to operate its road as to exclude it from liability to a license tax in common with others engaged in a like pursuit.

It follows that the ordinance imposing a license upon defendant is not obnoxious to the charge of being in violation of a contract.

By this reasoning we do not mean to imply that it is in the power of a municipal corporation, by a contract concerning its property, to divest itself of any of its governmental functions.

We are of opinion the judgment and order appealed from should be affirmed

FOOTE, C., and BELCHER, C. C. concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9865. Department Two.—August 29, 1885.]

F. A. WENZEL, RESPONDENT, v. COMMERCIAL INSURANCE COMPANY OF CALIFORNIA, APPELLANT.

FIRE INSURANCE—POLICY—CONDITION AS TO WATCHMAN.—The property insured was a quartz mill. At the time of the issuing of the policy the mill was in operation, but afterwards became idle, and so continued until destroyed by fire. One of the conditions of the policy was that the insured should employ a watchman to guard the premises when idle. The only watchman employed was a person who worked during the day and slept at night too far from the mill to guard it against fire. The mill could not be seen from the place where he slept, nor did he know of the fire until after it occurred, and the mill was destroyed. *Held*, that the condition had not been complied with.

ID.—CHANGE OF POSSESSION.—A further condition of the policy was that if any change should take place in the possession of the property without the written consent of the insurer, the policy should be void. *Held*, that the condition was violated by leasing the property and surrendering possession to the lessee without such consent.

APPEAL from a judgment of the Superior Court of Tuolumne County, and from an order refusing a new trial.

The facts are stated in the head-notes and opinion of the court.

R. B. Wallace, for Appellant.

Street & Street, for Respondent.

MORRISON, C. J.—This is an action on a policy of insurance issued by defendant to plaintiff on the 7th day of October, 1881, by the terms of which, in consideration of a certain premium paid the former by the latter, defendant insured the plaintiff, for the term of one year, on his certain quartz-mill, situated in the county of Tuolumne, and on other property in the policy enumerated, against loss by fire.

Among the conditions contained in the policy are the following: "It is understood and agreed that a watchman shall be employed by the assured to guard the premises during such time as the mill is idle. . . . Any false representation by the assured of the condition of the property . . . or any over-valuation thereof . . . or any false or fraudulent representation to the authorities touching the property hereby insured . . . or any change in the possession without the written assent of the company shall render the policy void." These are the important conditions affecting the policy which it is material to consider in

this case, and all of which, it is claimed by the company, have been violated and disregarded by the plaintiff. The mill was destroyed by fire on the 2d day of August, 1882, and within the time covered by the policy of insurance. The company refused to pay the loss incurred, and this action was brought to recover the same of the company. Plaintiff had judgment in the court below. Appellant moved for a new trial, which was denied by the court, and the appeal is from the judgment as well as the order denying the motion for a new trial. At the time of his application for insurance the plaintiff represented to one Deickman, the agent of the company, that the property covered by the policy was of the value of \$12,000, and the defendant, believing such representation to be true, insured the property on the basis of a valuation thereof at \$12,000. This is the fourth finding of the court. The court further finds in the same finding that the property was of no greater value than between \$8,000 and \$9,000, but the plaintiff did not intentionally deceive Deickman, the agent of the defendant, but on the contrary the plaintiff estimated the property at its cost, which was the sum of \$12,000. How far did this false representation of value, although not made fraudulently, affect the validity of the contract? Was it a breach of a condition of the policy?

Another important fact in the case appears clearly from the evidence that the insured reported to the authorities in giving in this property for assessment, that its value was only \$500, and, on that amount only he paid taxes on the property for the fiscal year 1881 and 1882.

Another point made on behalf of the defense is that the policy contained a condition to the effect that a watchman should be employed by the insured to guard the premises during such time as the mill should be idle. Was that condition kept and observed by the plaintiff? The sixth finding is, "that during the space of five weeks, immediately prior to the 16th day of October, 1881, said quartz-mill was continuously in operation crushing ore from the Lynch quartz mine; that thereafter said mill was idle until June, 1882; that it was idle from on or about the 1st day of July, 1882, to the 2d of August, 1882, at which time said mill was destroyed by fire, and that it was idle at the time of its destruction."

By the thirteenth finding the court finds that one Lynch was employed to watch and guard the mill, and appellant's counsel makes the point that this is not a finding that Lynch was employed as a *watchman* of the premises. However this may be, it is apparent from the uncontradicted evidence in the case that Lynch was not employed as a watchman of the premises within the sense and meaning of the contract. It appears that Lynch was working in his own mine, 2,100 feet distant from the mill, for six or seven hours during the day, and that at night he slept in a house 900 feet from the mill, between which house and the mill a hill intervened, which prevented this so-called watchman from seeing the mill. The mill was burned and destroyed without waking Lynch, and the first intimation he had of the destruction of the property was in the morning after the fire. He was too far away from the property during the hours of the night, when it most required watching, to be of any use whatever as a watchman of the premises. A watchman, according to Webster, is a sentinel, and a watchman of a building is one who takes care of it during the night-time. There are other reasons apparent from the evidence in the case for holding that the conditions of the contract for a watchman on the premises were not kept by the insured, but we have confined ourselves to the *undisputed* facts of the case.

Another point made by the appellant is that the condition of the policy in regard to a change in the possession of the property was broken by the insured. In the ninth finding it is found by the court as a fact in the case that on the 17th day of January, 1882, the plaintiff and others, without the consent of the defendant, leased the property insured, and surrendered the possession thereof to Joseph Hoskins and his associates. This was a breach of a condition in the policy which rendered the same void according to the express language thereof.

We are of opinion that according to the findings of the court and the uncontradicted evidence in the case, the plaintiff was not entitled to judgment. A breach of any one of the conditions contained in the policy was a fatal breach on the part of the assured, and a good defense to his right of recovery. (§§ 2607, 2612, Civ. Code.)

We cite the following authorities as bearing on the points decided in this case: (*Gladding v. Ins. Co.* 66 Cal. 6; May on

Insurance, §§ 156, 157; *Ripley v. Ætna Ins. Co.* 30 N. Y. 162; Civ. Code, § 2611.)

Judgment and order reversed.

SHARPSTEIN, J., concurred.

THORNTON, J., concurred in the judgment.

[No. 9152. In Bank.—August 29, 1885.]

PETER G. SHARP, APPELLANT, v. JOHN M. BLANKENSHIP, RESPONDENT.

DIVISION LINE—PAROL AGREEMENT—STATUTE OF FRAUDS.—A parol agreement between co-terminous proprietors of land that a surveyor should run a line between their respective tracts, and that such line should become the division line, is invalid under the Statute of Frauds.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

W. L. Dudley, and *J. B. Hall*, for Appellant.

The parol agreement to have the division line surveyed and to abide by the result was within the Statute of Frauds, and not binding. (*Jackson v. Long*, 7 Wend. 169.)

J. C. Campbell, and *F. T. Baldwin*, for Respondent.

The agreement as to the survey was not void under the Statute of Frauds. (*Kincaid v. Dormey*, 47 Mo. 337; *Kellum v. Smith*, 65 Pa. St. 86; *Orr v. Hadley*, 36 N. H. 575.)

THORNTON, J.—Action of ejectment to recover a tract of land situated in San Joaquin County. Both parties claim under Charles M. Weber. The land in controversy was parcel of a rancho known as the Campo de los Franceses, of which Weber was the owner. The litigation is in regard to a boundary line between the plaintiff and defendant. The boundary line in controversy is the western line of plaintiff and the eastern of defendant.

There was evidence tending to show that Weber had caused the rancho above named to be surveyed and subdivided into sections, the sections being sixty-nine (69) chains and seventy-two (72) links square, the side lines of the section being a little less than ten chains short of a mile, and that these sections were subdivided into four quarters, constituting four squares of equal area. There was also evidence tending to show that this boundary line in dispute was marked by stakes set in the ground when the survey of the rancho was made by Weber; that the boundary line in dispute was marked by corner posts or stakes that were pointed out to Balch, the grantor of defendant, in 1858 by Weber. This appears to have been done in 1858 when Balch was negotiating with Weber for the land which was afterwards purchased by Balch of Weber, and this Weber conveyed to him. The evidence further tended to show that the western boundary line of plaintiff was marked by corner posts or stakes. There was no controversy that plaintiff owned the southeast quarter of section twenty-six, and that defendant owned the portion of the southwest quarter of same section, adjoining in its whole length on the west the southeast quarter.

The testimony also tended to show that soon after Balch went into possession in 1857, he built a fence from corner section post to corner section post on the west line of southeast quarter of section twenty-six; that it remained there until some time in 1877 or 1878, when a controversy arose between plaintiff and defendant as to the boundary line between them, defendant claiming that plaintiff had in his possession within the fence above mentioned some of his (defendant's land). This plaintiff denied, but averred that he did not wish to deprive defendant of any land owned by him. Under this state of things an arrangement was entered into between them by which a surveyor was employed to run the disputed line between them at their mutual expense. This appears to have been done, and the line as surveyed and run did show that plaintiff's enclosure did contain land that was a part of southwest quarter of section twenty-six belonging to defendant. Plaintiff insisted that the line was not correctly run, was not on the true line, and there was evidence to show that he never agreed to accept or adopt the line thus run as the true line.

The plaintiff requested the court to charge the jury as follows:—

“Although the jury shall find from the evidence that the plaintiff agreed with the defendant in 1877, or thereafter, that the county surveyor should run the line between their respective lands, and such line should become the line on which the division fence should be built, yet if the jury shall further find that said plaintiff, at any time before the entry of said defendant on the land in suit, refused to accept or adopt the said surveyed line as the true and correct line, the jury must consider the case in the same light as if plaintiff had not agreed to have the line surveyed, and as if no survey had in fact been made.” This request was refused and plaintiff excepted.

It is apparent from what has been above stated that the evidence tended to show that the plaintiff derived title to the part of land known as southeast quarter of section twenty-six, the western boundary of which was marked by stakes or posts put in the corners by Weber for that purpose, and that plaintiff took possession and built the fence on this line according to the line so marked.

Now if plaintiff obtained title to and became owner of the quarter section above mentioned, bounded on the west by a fence between the posts above mentioned, it would be difficult to perceive, under the Statute of Frauds of this State in force at the time the transactions referred to took place, why he lost it by a line surveyed in the manner above pointed out, to which he never agreed. If the line thus surveyed had been adopted by both parties, and possession taken accordingly and held for a period of time sufficient to build up a title by adverse possession, it might be held that the title would have vested in them according to the line so adopted and acted on; but there is no such evidence here. (See *Adams v. Rockwell*, 16 Wend. 285, and cases there cited and commented on.) Indeed there is evidence which if true, proves that the plaintiff never agreed to or adopted the line.

The court erred in refusing this instruction. Nor was the error cured by giving it with the words appended by the court. The words appended are, “except so far as the evidence in regard to the agreement of survey may tend to show that there was no acquiescence on the part of Blankenship in the old line.”

We cannot perceive that the words appended are at all pertinent to or had any connection with the matter of the request.

The latter relates only to a new line, and the former to the old line, which appeared to be and was entirely different from the new. The question whether Blankenship, the defendant, acquiesced in the old line or not, had no connection with the proposition stated in the request in regard to the new line. The request did not tend in any way to take from the consideration of the jury anything in the case bearing on the issue of the acquiescence of defendant in the old line. The words added to the request by the court certainly had a tendency to lead the minds of the jury away from the question which should have been submitted to them as embodied in the request.

For this error the judgment and order are reversed and the cause remanded for a new trial.

MORRISON, C. J., MCKINSTRY, J., ROSS, J., and MYRICK, J., concurred.

[No. 8872. Department Two.—September 18, 1885.]

IN THE MATTER OF THE ESTATE OF WILLIAM H.
DALRYMPLE, DECEASED.

WILL—CONTESTING PROBATE—JURY TRIAL.—In a contest as to the probate of a will, where a jury was impaneled to try the issues, the contestants were not prejudiced by the action of the court in submitting to the jury certain issues proper in themselves, but amounting substantially to a repetition of others presented by them and allowed by the court, and on which the jury found against them.

ID.—PRACTICE—ORDER OF PROOF.—In such a case, the contestants are plaintiffs, and have the affirmative of all the issues raised by the contest.

ID.—INSANITY—EVIDENCE.—It being claimed that the will was invalid by reason of the insanity of the testator at the time of its execution, evidence was admitted as to his sanity at other times during the course of a progressive disease supposed to have affected his mind. *Held*, that the evidence was properly admitted.

ID.—GROUND OF CONTEST NOT INCLUDED IN THE ISSUES.—Where a question affecting the validity of the will is not included in the issues submitted to the jury, the court may proceed to determine it upon the evidence.

APPEAL from a judgment of the Superior Court of the county of Marin, and from an order refusing a new trial.

The will was conditional to take effect in case the testator should die from the illness under which he was suffering at the time of its execution. The remaining facts are stated in the head-notes and opinion.

H. Dorsey Gough, and L. Quint, for Appellants.

Flournoy & Mhoon, for Respondent.

FOOTE, C.—The tenth and eleventh issues allowed to be tried by the jury in this, a case of the contested probate of a will, were not in themselves improper, under the rule laid down in the *Gharky Case*, 57 Cal. 274.

The contestants claimed those issues to be substantially a *repetition* of the seventh and eighth tendered by them and allowed by the court, and that those last wherein the jury found against them were the true issues upon the matters to which they related. If this be true, contestants cannot complain, since the finding of the jury upon those issues support *pro tanto* the order or decree made and entered by the court.

There can be no reasonable ground to doubt that section 607 and section 1312, subdivision 4, of the Code of Civil Procedure, as construed in the *Estate of Collins*, Myrick's Reports, 73, constituted "on the trial the contestants plaintiffs, and the petitioner defendant." The reason there given that the matter is entirely controlled by the statute seems to be conclusive.

The court rightfully said "as to all matters involved in the issues raised by the contest, the contestant is plaintiff and must go forward."

The evidence submitted to the jury being conflicting upon all the material issues, their verdict should be upheld.

Objection is urged to the competency of the testimony of various witnesses for the proponent. It is claimed that not being experts they should have established their intimacy with the testator, and before being permitted to testify as to their opinions of his sanity or insanity, should have stated the reasons therefor.

The testimony as delivered by the witnesses appears to have made evident the intimacy required, and to have included the reasons for their opinions.

The objection that the witnesses testified to the condition of mind of the testator at times too remote from that of the execution of the will is not tenable. The disease causing his insanity was a progressive one.

The court committed no error in admitting or excluding any

of the evidence offered. (§ 1870, subd. 10, Code Civ. Proc.; *People v. Sanford*, 43 Cal. 33; *Estate of Toomes*, 54 Cal. 509.)

The law as contained in the instructions given by the court to the jury and allowed to go to them as requested by counsel, is properly stated. The modifications of instructions made were correct, as was also the refusal of certain of them.

That tribunal seems to have had in view in its action in the premises, the law as laid down in the *Estate of Gharky*, 57 Cal. 274, and *Estate of Low*, Myrick's Reports, 147; and applied the correct principles therein stated to the facts of the case at bar.

There was no question of marriage involved in the contention, and the jury were not misled, but disabused of any wrong impression which they might otherwise have had from the proposed instruction asked by contestants on that subject; and refused orally in their presence by the court, as also from the testimony on that point by Mr. Gough.

The conduct of the court in studiously keeping the jury upon the beaten track as to the issues to be by them tried, is to be commended.

Its action in finally making and entering its order or decree without allowing the contestants at the time proposed by them to have the issues tried, whether or not the death of the testator had been the result of the illness under which he suffered at the time of the execution of the will, was proper.

The testimony was ample to support the finding of the court upon that point, and the contestants by not including it among the issues they first submitted to the jury, and upon which the jury found, waived such right, and it then became the duty of the court to consider the evidence and make a finding thereon.

The province of the court and jury in such case is stated in the *Estate of Thomas Collins*, *supra*.

"The theory of this statute seems to be as follows: A paper is offered as a will; it is contested on any one or more of the statutory grounds; a jury is sworn to try the issues raised by the contest, not to pass upon any other fact. Upon those issues the contestant is plaintiff. It may happen that a contest is raised as to one only of the statutory grounds, for instance say not witnessed. That issue is the only one before the jury and their verdict will be conclusive upon it. But upon the render-

ing of the verdict upon that issue, the court could not admit the will to probate. The court, not the jury, will hear evidence on all the points required by the statute, not raised by the contest, and admit or reject."

The order of the court admitting the will to probate and appointing Peter Alferitz administrator, etc., and that denying a new trial, ought to be affirmed.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the orders are affirmed.

Hearing in Bank denied.

[No. 8014. Department One.—September 21, 1885.]

YSABEL A. DE ARGUELLO, APPELLANT, v. B. W. BOURS
ET AL., RESPONDENTS.

DEED—FILLING IN BLANK AFTER EXECUTION—LEGAL TITLE.—A deed in which the name of the grantee is left blank by the grantor at the time of its execution, and afterward inserted without his authority, does not convey any title, nor does it become sufficient for the purpose of passing the legal title from the fact that the grantee enters into possession and pays the purchase price.

EJECTMENT—EQUITABLE DEFENSE—PLEADING.—In an action of ejectment, where the plaintiff has the legal title, and the defendant is in possession under a contract of purchase from one under whom the plaintiff claims, and has fully complied with the terms of the contract, the equitable title thus vested in the defendant may be pleaded in defense of the action. The facts constituting the defense must be fully stated in the answer, but a prayer for equitable relief is not required, nor is it material that the defendant may by lapse of time or other cause have lost his right to such relief.

APPEAL from a judgment of the Superior Court of the county of San Joaquin, and from an order refusing a new trial.

The facts sufficiently appear in the opinion of the court.

D. M. Delmas, for Appellant.

Terry & McKinne, and *J. H. Budd*, for Respondents.

MCKINSTRY, J. — This action is ejectment, brought by plaintiff as devisee under the will of José R. Arguello, deceased; the

complaint alleging that José R. Arguello was seized in fee of the premises at the time of his death.

The answer admits that José R. Arguello was in his lifetime, and up to the 14th day of September, 1876, the owner in fee of the premises, but alleges that, on that day, he sold and conveyed said premises to the defendant for the consideration of \$1,000, which was the full value thereof, and which sum was on that day fully paid by defendant Bours to said Arguello, and that said defendant entered into possession of said premises under said sale and not otherwise. That said defendant is and since said 14th day of September, 1876, has been the *owner in fee* of said premises, and that defendant F. A. Ruhl, at the time of the commencement of this suit, occupied and now occupies said premises as the tenant of the defendant Bours, and said Ruhl has and claims no right, etc., except as tenant, etc.

If the foregoing is to be construed as being, in legal effect, merely a denial of the averments of the complaint, the court below erred in refusing to give to the jury the instruction asked by counsel for the plaintiff, which reads as follows:—

“If the jury believe from the evidence that when the deed offered in evidence herein, and dated September 14, 1876, came into the hands of the defendant B. W. Bours, it had already been signed and acknowledged by J. R. Arguello, and that the name of B. W. Bours did not then appear therein, and that afterwards one Inglis, by direction of said Bours, in the absence of said Arguello, and *without any authority* from him, wrote the name of said Bours therein, and that thereupon said Bours took said deed and filed the same for record, the plaintiff is entitled to your verdict.”

Certainly the deed did not convey the legal title if Arguello never authorized the insertion of the name of defendant. That such authorization might be proved by circumstantial evidence does not affect the decision of the question.

Nor is the decision of the question affected by the abolition of all distinctions between sealed and unsealed instruments. (Civ. Code, § 1629.) As to unsealed instruments, a blank could always be filled in by a person authorized by the maker. But the instruction above recited speaks of the absence of “any” authority from José R. Arguello for the insertion of the name of Bours.

It is not necessary to determine whether the averment that José R. Arguello "conveyed" to defendant Bours on a certain day, and that the latter, since that day, has been "the owner in fee," may be disregarded.

Some of the instructions given to the jury were confusing and erroneous. The court seems not to have decided whether the answer made an issue simply as to the plaintiff's legal title, or alleged equities which entitled defendants to retain possession of the demanded premises; but to have treated it as doing both. And the jury were authorized (so far as the court below could authorize the jury) to base their general verdict either on a finding that plaintiff did not have the legal title, or if plaintiff had the legal title, that defendant Bours was entitled to retain the possession by virtue of an executed contract of sale and purchase. To reach the second question suggested (was the defendant in possession under such contract fully executed on his part?) the jury were authorized to construe, interpret, and determine the legal effect of an instrument in writing. "If the jury believed . . . that said Arguello signed and acknowledged a deed for said property and sent the same to the defendant, omitting to insert the name of the grantee, *that by reason of said omission, the deed signed by the said Arguello was not sufficient to pass title,*" etc.

The court also charged:—

"If the jury believe from the evidence that when the deed offered in evidence herein came into the hands of defendant Bours, it had already been signed and acknowledged by J. R. Arguello, and that the name of B. W. Bours did not then appear therein, and that afterwards one Inglis, by direction of defendant, in the absence of said Arguello, and without any authority from him, wrote the name of said Bours therein, and that thereupon said Bours took said deed and filed the same for record, then such deed the court instructs you would not be sufficient to pass the title, unless you further find from the evidence that the defendant purchased the premises therein named from said Arguello, paid the purchase price, and entered into and held possession thereof, claiming the same as his own by virtue of such purchase and payment."

The jury were thus told in effect that although the name of Bours was inserted in the "deed" without any authority, express

or implied, from Arguello, yet such deed would be sufficient "to pass the title," if the defendant purchased the premises, paid the purchase price, and entered into possession, etc. This must be construed as an instruction that, if defendant entered under a contract and had fully performed its conditions on his part, the *legal title* passed to him by the *deed*.

For these reasons the judgment and order must be reversed.

Inasmuch, however, as another question has been discussed by counsel, we deem it proper to say that, under our system of practice, a defendant may plead, as a defense to "ejectment," that he is in possession under a contract of purchase, the conditions whereof have been fully performed on his part; in other words, that he is in possession under a contract which gave him the right of possession, and that he is entitled to retain the possession as against the bare, naked title of his vendor, which the vendor holds disconnected from any real interest. A perfect equity, united to the possession, is under our system equivalent for all purposes of defense to a legal title. (*Morrison v. Wilson*, 13 Cal. 494; 73 Am. Dec. 593.) A vendee in possession under an executory contract, the conditions of which have been performed on his part, may avail himself of his equitable title as a defense to an action of ejectment brought against him by the holder of the legal title. (*Love v. Watkins*, 40 Cal. 547.) A mere equitable title to land, if of such a character as in equity entitles the holder to the possession, is a sufficient defense to an action for the possession brought by the holder of the legal title. (*Willis v. Wozencraft*, 22 Cal. 607.)

But whether a defendant relies upon his equities merely as a defense to the ejectment, or alleges them in a cross-bill and bases on them a prayer for equitable relief, the *facts* must be fully set forth in the answer; as fully as it would be necessary to allege them in the stating part of a bill in equity, praying a decree for a conveyance of the legal title. (*Miller v. Fulton*, 47 Cal. 146; *Bruck v. Tucker*, 42 Cal. 352; *Kentfield v. Hayes*, 57 Cal. 411.) In *Kenyon v. Quinn*, 41 Cal. 325, and *Cadiz v. Majors*, 33 Cal. 288, the equities of the defendant were not pleaded. The *dicta* in the decisions of cases where the answer consisted of mere denials, that the equitable defense should be pleaded with a *prayer* for affirmative relief, are not to be regarded as authoritative.

In an action of "ejectment," by a plaintiff having the legal title, the defendant may rely on a contract of purchase, which gave him the right of entry, and which has been completely executed and performed on his part, together with his continued possession. But all the facts on which he relies should be averred in the answer. In view of the intimation in *Bruck v. Tucker*, it will always be safer to aver (as was done in this case) that the price paid was a just and fair price and the full value of the premises.

Of course, under such circumstances, the defendant will usually pray for equitable relief. If, by lapse of time or for any other reason, he may have lost his right to an equitable decree, he will still be entitled to rely on his perfect equity as a defense to an action brought to deprive him of the possession.

Judgment and order reversed and cause remanded for a new trial.

Ross, J., and McKee, J., concurred.

[No. 9903. Department Two.—September 22, 1885.]

JOHN MURPHY, RESPONDENT, v. J. D. SNYDER,
APPELLANT.

FORCIBLE DETAINER—POSSESSION—LEASE AS EVIDENCE.—In an action for a forcible detainer, a lease to the plaintiff under which he had formerly been in possession of the land in controversy, *held*, admissible in evidence for the purpose of showing the extent of such possession, and his right to possession at the time of the alleged forcible detainer.

ID.—PRACTICE—FINDINGS—CONCLUSION OF LAW.—A direction added by the court to its findings of fact, that judgment be entered in accordance with the findings in favor of the plaintiff for restitution of the premises, and for his costs and disbursements, states a conclusion of law.

APPEAL from a judgment of the Superior Court of Santa Barbara County, and from an order refusing a new trial.

The plaintiff claimed the right of possession under the lease mentioned in the opinion; the defendant under a subsequent lease. The term of the plaintiff's lease had expired at the time of the alleged unlawful entry of the defendant, but the lease

contained a clause giving the plaintiff the privilege of retaining possession of the land on a certain condition which he claimed to have fulfilled. The remaining facts are stated in the opinion of the court.

Jarret T. Richards, John T. Boyce, R. M. Dillard, and Chas. E. Huse, for Appellant.

McNulta & Oglesby, for Respondent.

THORNTON, J. — Action for a forcible detainer. There was no error in admitting in evidence the lease to plaintiff. It was admissible in connection with plaintiff's former possession to show the extent of such possession.

In an action for a forcible detainer the plaintiff is entitled to recover on showing the forcible detainer, and that he is entitled to the possession at the time of such forcible detainer. (Code Civ. Proc. § 1172.) The lease was admissible also to show that plaintiff was entitled to the possession.

The objections of plaintiff to certain questions asked by defendant of witness Mullaney were properly sustained, as was also the objection to a question asked plaintiff. These questions related to matters which were entirely irrelevant to the issues to be tried.

There was evidence tending to prove the allegations of the complaint.

It is urged that the court below, in giving its decision, stated no conclusion of law. The record shows that after finding the facts the court adds this direction: "Let judgment be entered in accordance with the foregoing findings in favor of plaintiff for restitution of said premises, and for his costs and disbursements in this action."

This, in our judgment, is in substance a conclusion of law stated by the court that the plaintiff is entitled to recover the possession of the premises sued for. It would be yielding too far to mere form to hold that the above is not a conclusion of law.

Judgment and order affirmed.

MORRISON, C. J., and MYRICK, J., concurred.

[No. 11217. Department One.—September 23, 1885.]

WILLIAM F. DALZELL, PETITIONER, v. THE SUPERIOR COURT OF SAN BENITO COUNTY, RESPONDENT.

PRACTICE—APPEAL FROM JUSTICE'S COURT—NOTICE—PROOF OF SERVICE.

—Where the record of a case on appeal from a Justice's Court is silent as to service of the notice of appeal, the fact of service may be proved by an affidavit filed pending a motion to dismiss the appeal on that ground.

Id.—ATTORNEY ABSENT FROM HIS OFFICE.—An affidavit of service which states that a notice was served on the attorney for the respondent by leaving it on the desk of the attorney in the front room of his law office between the hours of 8 in the morning and 6 in the afternoon, and that there was no person in *said front room* at the time, is insufficient to show constructive service of the notice upon the attorney during his absence from his office.

Id.—JURISDICTION.—Service of notice of an appeal is a jurisdictional fact, and if such service has not been made within the statutory time and according to the requirements of the statute, the appellate court derives no jurisdiction of the case.

APPLICATION for a writ of review. The facts are stated in the opinion of the court.

Montgomery & Scott, and *N. C. Briggs*, for Petitioner.

B. B. McCroskey, for Respondent.

McKEE, J. — Application for a writ of review.

It appears from the allegations of the petition that the Superior Court of San Benito County, upon the hearing of a motion to dismiss an appeal taken from a judgment rendered by a Justice's Court, finding that there was no service of the notice of appeal to give the court actual jurisdiction of the case ordered a dismissal of the appeal; and it is contended that this order was in excess of the jurisdiction of the court and void, because service of the notice of appeal as prescribed by law was substantially proved upon the hearing of the motion to dismiss.

The papers in the case, transmitted by the justice to the Superior Court, did not show any service whatever. But pending the motion made to dismiss the appeal on that ground, appellant's attorney filed an affidavit upon which it was claimed that service of the notice of appeal had been made upon the attorney of the adverse party, during his absence from his office.

Where the record of a case on appeal from a Justice's Court is silent as to service of the notice of appeal, the fact of service may be proved by affidavit; but the affidavit must show that

all the requirements of the law to effect service were complied with. (*Mendioca v. Orr*, 16 Cal. 368; *Doll v. Smith*, 32 Cal. 476.) Service is effected by personal delivery of a copy of the notice to the adverse party, or his attorney; or it may be made during the absence of the attorney from his office, if the office be open, by leaving the notice . . . with his clerk, or other person in charge of the office, or if there is no person in the office, by leaving it between the hours of 8 in the morning and 6 in the afternoon in a conspicuous place in the office, etc. (Subd. 1, § 1011, Code Civ. Proc.)

The affidavit of service states that the notice of appeal was served on the attorney for respondent "by leaving it on the desk of the said attorney in the front room of his law office . . . between the hours of 8 in the morning and 6 in the afternoon of the 6th of June, 1885," . . . and "that there was no person *in said front room* of said office at the time said notice of appeal was left there," etc.

This was insufficient to show constructive service of the notice upon an attorney absent from his office. Taking as incontrovertible the fact that the attorney upon whom service was attempted to be made was not *in the front room* of his office at the time, his absence from his office is not deducible from the fact. It is not claimed that "the attorney of respondent" got the notice. In fact the affidavit states the attorney complained that "he would not have known that an appeal had been taken if he had not seen it in the newspapers."

The proof of service was therefore legally insufficient, and the court did not exceed its jurisdiction in so determining and in ordering a dismissal of the appeal. Service of notice of an appeal is a jurisdictional fact; and if service has not been made within statutory time, and according to the requirements of the statute, to effect service, the appellate court derives from the notice no actual jurisdiction of the case, and the appeal is dismissible *ex mero motu*, or on motion of respondent, for want of jurisdiction. (*Coker v. Superior Court*, 58 Cal. 177; *Trobock v. Caro*, 60 Cal. 304.)

Application for writ denied.

Ross, J., and McKINSTRY, J., concurred.

[No. 9754. Department One.—September 24, 1885.]

NETTIE D. HARRIS, ADMINISTRATRIX OF THE ESTATE OF
JAMES H. HARRIS, DECEASED, RESPONDENT, v. E. A
HARRIS, APPELLANT.

EVIDENCE—STATEMENTS OF A DECEASED PERSON AGAINST HIS INTEREST.

—In an action to cancel a deed made by a son just before his death to his father, and to quiet the title of the son's estate to the lands purporting to be conveyed thereby, one of the issues was whether or not the son had acquired these lands by a previous conveyance from his father without consideration, and as trustee for the latter to reconvey them when requested so to do. In connection with this issue, it was shown by the plaintiff that a bill of sale of certain personal property was given by the father to the son at the time of the alleged conveyance from him to his son, and that a second bill of sale of the same property was given by the son to the father at the time of the deed of conveyance sought to be cancelled, and that these two bills of sale were so intimately connected with the conveyances as to form substantially parts of the same transaction. *Held*, that statements by the son at the time as to the consideration for the first bill of sale were admissible on behalf of the defendant.

APPEAL from an order of the Superior Court of Lassen County refusing a new trial.

The facts are stated in the head-note and opinion.

Hart & White, C. G. Kelley, and M. Marsteller, for Appellant.
E. V. Spencer, and C. McClaskey, for Respondent.

FOOTE, C. — An appeal from an order refusing the defendant a new trial.

The respondent objects to the consideration by this court of the statement on that motion, which is incorporated in the transcript.

We can see no force in his objection.

This was an action to cancel a deed, made by a son, just preceding his death, to his father, and to quiet the title of the son's estate, to the lands purporting to be by that deed conveyed.

It was an issue in the case, whether or not the son had acquired these lands by a previous conveyance from his father, without consideration, and as a trustee for the latter, to reconvey them when requested by him so to do.

As bearing upon this, the plaintiff introduced in evidence two bills of sale of a band of horses, the first from the father to the son, the second from the son back to the father.

It also appeared, from the plaintiff's evidence, that the bills of sale were cotemporaneous with the deeds of conveyance, that is, that the father's deed to the son was made in connection with the first, and the son's deed in connection with the second bill of sale, and that the transfers of the lands and horses by both father and son were, in point of time and other material ways, respectively, so blended together, as to be substantially parts of one transaction, where the surrounding circumstances and statements of the parties at these respective times became pertinent in their entirety.

A motion was made by the plaintiff's counsel to strike out certain parts of A. A. Smith's testimony relative to statements made by James H. Harris as to the consideration of the first bill of sale. And objection was also made by him to certain questions on this same subject, propounded by defendant's counsel to Smith.

This motion to strike out, as also the objections to the questions, were sustained by the court, and excepted to by the defendant, and are assigned as errors in his eleventh, twelfth, thirteenth, and fourteenth specifications thereof.

Under the issue above stated, and the evidence as then before the court, a full and fair investigation of the matter was proper, and to that end all of the evidence given by and offered from Smith was pertinent, and the court erred in striking out any part thereof, and in not permitting him to make responsive answers to the questions specified in their entirety. And it should have considered such answers in rendering judgment in the case.

It was proposed to impeach the witness McKissick by the evidence offered of the witness Mrs. Shinn. That evidence should have been admitted. The foundation for it was sufficiently laid; and the questions asked and proposed to be asked Mrs. Shinn, with the above-mentioned object in view, were proper.

The order of the court below should be reversed and the cause remanded for a new trial.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the order is reversed and cause remanded for a new trial.

[No. 9904. Department One.—September 24, 1885.]

IN THE MATTER OF THE ESTATE OF A. B. LUTZ,
DECEASED. A. B. LUTZ, JR., APPELLANT, v. E. CHRISTY
ET AL., EXECUTORS, ETC., RESPONDENTS.

ESTATE OF DECEDENT—REFUSAL TO SET ASIDE ORDER OF DISTRIBUTION—
APPEAL.—An order refusing to set aside an order distributing the
estate of a decedent, and settling the final account of the executor,
is not appealable.

APPEAL from an order of the Superior Court of Sacramento
County refusing to set aside an order of distribution and settle-
ment of the final account of an executor.

The facts are stated in the opinion.

S. F. Geil, and *D. E. Alexander*, for Appellant.

L. S. Taylor, for Respondents.

FOOTE, C.—The only matter disclosed by the record here,
which this court should consider, is the appeal from an order of
the court below, refusing to set aside and vacate a former order
of distribution and settlement of the final account of an executor.

In our opinion, such an order is not included in those enumer-
ated in subdivision 3 of section 963 of the Code of Civil Pro-
cedure, and the appeal should be dismissed. (*Blum v. Brown-
stone Bros.* 50 Cal. 293; *Estate of Callahan*, 60 Cal. 232; *Estate
of Dean*, 62 Cal. 613.)

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion
the appeal is dismissed.

[No. 9963. Department One.—September 24, 1885.]

MAHALA SHUMWAY, RESPONDENT, v. JERRY LEAKEY,
APPELLANT.

MARRIED WOMAN—SEPARATE PROPERTY—REPLEVIN—PLEADING.—In an action by a married woman to recover personal property, she need not in her complaint allege the coverture, but when that fact appears on the trial, may show that the property demanded is her separate property.

ID.—EVIDENCE—SCHEDULE.—In such an action, a schedule of the wife's separate property filed and recorded under sections 165 and 166 of the Civil Code is admissible in evidence to prove her title.

ID.—ASSESSMENT ROLL.—The assessment roll of the county showing that no separate property has been assessed to the wife, and that part of the property described in the complaint was assessed to the husband as his own, is inadmissible to prove property out of the wife and in her husband, unless it is shown that she gave in the property as that of her husband or had some knowledge that it was so assessed.

ID.—LAWS OF ANOTHER STATE.—The tenure by which personal property acquired in another State and brought into this is held, as between husband and wife, will depend upon the laws of the State where it was acquired; but these laws are to be proved like any other fact, and in the absence of all evidence will be presumed to be the same as the laws of this State.

APPEAL from a judgment of the Superior Court of Lassen County.

The facts are stated in the opinion.

E. V. Spencer, for Appellant.

A. L. Shinn, and *J. D. Goodwin*, for Respondent.

SEARLS, C. — The plaintiff, a married woman, brought this action to recover as her separate property, certain personal property from defendant, who as sheriff of the county of Lassen had levied upon and taken the same under a writ of attachment against plaintiff's husband, and as the property of the latter. Plaintiff had verdict and judgment. Defendant appeals.

It was not necessary for plaintiff to aver coverture in her complaint, and when that fact appeared at the trial, it was competent for her to show that the demanded property came to her as a gift, and was her separate property.

Had her complaint shown her to be a married woman, it would have been incumbent upon her to state such other facts as were necessary to entitle her as such to maintain the action. (*Thomas v. Desmond*, 63 Cal. 426.)

In *Peters v. Fowler*, 41 Barb. 467, it was held that in that State (New York), "the fact of coverture has ceased to have any relation to the technical right of maintaining an action by a married woman in respect to her separate property, and the allegation of coverture in the complaint is no longer necessary."

The schedule of plaintiff's separate property recorded in the office of the county recorder, November 13, 1877, was properly admitted in evidence.

The Civil Code, sections 165 and 166, provides for filing and recording the separate personal property of the wife, and "the filing of the inventory in the recorder's office is notice and *prima facie* evidence of the title of the wife."

The cattle described in the schedule are of the same general kind as a portion of that seized by the sheriff, and whether in fact the identical property so seized, was a question to be determined by evidence *aliunde*.

Defendant offered in evidence the assessment role of Lassen County for the years 1882-83, for the purpose of showing that no separate property had been assessed to plaintiff, and also to show that part of the property described in the complaint was assessed to B. F. Shumway, the husband of plaintiff, as his own property and not as the property of his wife, the plaintiff.

Plaintiff objected on the ground that such evidence was immaterial and incompetent.

The objection was sustained and the ruling is assigned as error.

In *Arnold v. Skaggs*, 35 Cal. 684, an assessment roll was held competent as evidence. The question was whether defendant Skaggs or one Ingles owned certain personal property, and the evidence showed that Ingles gave it in to the assessor as the property of Skaggs; that the latter appeared before the board of equalization for the purpose of procuring a reduction of the amount of the assessment. Under these circumstances the assessment roll was held competent to prove property in Skaggs.

The present case differs materially from that. Here there was no proof, or offer to prove, that plaintiff gave in the property as that of her husband, or that she had knowledge that any part of it was so assessed. Under such circumstances the assessment roll was not competent evidence to prove property out of her and in her husband. (*Chamberlin v. Vance*, 51 Cal. 75.)

The refusal of the court to give the third and fourth instructions asked by defendant is assigned as error.

These instructions were to the effect:—

1. That the laws of another State can only be shown to the jury by offering them in evidence as other facts are proven.

2. That if the property claimed by plaintiff was by her received as a gift in another State then it was her separate property, or community property, as provided by the laws of the State where the gift was made. And if brought to this State, it would be held here by the same title which she had to it in such other State, and before plaintiff can hold the same here as her separate property she must show it was her separate property when brought here.

The evidence tended to show that certain cows were presented as a gift to plaintiff in 1863 in the Territory of Nevada; that in 1866 she sold a portion of the increase of such cows and brought the residue to this State, and that the demanded property has been mainly purchased with the proceeds of sales of such cows and their increase, which increase has amounted to a band or herd of many hundred cattle.

The record shows affirmatively that no evidence was introduced tending to show what the laws of Nevada were in 1863, concerning the separate property of married women.

It is true that the laws of a foreign state are to be proven like any other fact. It is equally true that the tenure by which personal property acquired in another State and brought here is held, as between husband and wife, will depend upon the laws of the State where acquired. (*Kreamer v. Kreamer*, 52 Cal. 302.)

It is nevertheless true, that in the absence of any proof as to the laws of another State, they will be presumed to be the same as our own. (*Marsters v. Lash*, 61 Cal. 622; *Norris v. Harris*, 15 Cal. 226.)

It follows that, as under our law, property acquired by the wife during coverture, by gift, is her separate property, and that we must presume the laws of Nevada to be the same as our own, and there being no testimony to give point to the instructions asked, they were inapplicable, admitting them to be correct as abstract propositions of law.

We are of opinion the judgment of the court below should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is affirmed.

[No. 9768. Department One.—September 24, 1885.]

JAMES QUINN, APPELLANT, v. CARL WINDMILLER,
RESPONDENT.

EVIDENCE—KNOWLEDGE OF THE COURT—UNITED STATES SURVEY—AREA OF QUARTER SECTION.—The court will take judicial notice of the intended area of a quarter section under the system adopted by the United States for surveying and marking out its public lands; and whenever a claim is made that a quarter section contains a greater area, affirmative proof must be produced that the lines were so run upon the ground as to include such greater area.

BOUNDARIES—DIVISION FENCE—PRESCRIPTION.—Where the owners of adjacent tracts of land, being ignorant of the exact position of the boundary line, erect a division fence under an agreement that when the true line is ascertained the fence shall be placed thereon, neither can, unless the line of the fence has been settled and agreed upon as the correct boundary line, acquire any title by prescription or estoppel to land of the other included in his tract by a mistake in the position of the division fence.

APPEAL from a judgment of the Superior Court of the county of Sacramento, and from an order refusing a new trial.

The facts are stated in the opinion.

Freeman & Bates, for Appellant.

The plaintiff showed title by prescription. (*Bauer v. Gottmanhausen*, 65 Ill. 499; *Faught v. Holway*, 50 Me. 30; *Smith v. Hamilton*, 20 Mich. 434; *Yates v. Shaw*, 24 Ill. 368; *McGee v. Stone*, 9 Cal. 600.)

A. P. Catlin, for Respondent.

The possession of the plaintiff was not adverse. (*Farish v. Coon*, 40 Cal. 33; *Irvine v. Adler*, 44 Cal. 559; *Thompson v. Pioche*, 44 Cal. 509; *Thompson v. Felton*, 54 Cal. 547.)

BELCHER, C. C.—The plaintiff and defendant own lands which adjoin on two sides, a mile on one side and a half mile on the other. In 1872 or 1873 the plaintiff's grantor and the defendant constructed a fence to divide their lands. This fence remained where it was placed till May, 1883, when the defendant, claiming that it was on his land and not on the true lines between them, removed a portion and asked the plaintiff to remove the balance of it. This action was then commenced by the plaintiff, to quiet his title up to the lines of the fence as it stood before any of it was removed. The case was tried and judgment rendered in favor of the defendant, from which and from an order denying a new trial the appeal is taken.

In his complaint the plaintiff describes the land to which he claims title as commencing at the center of a certain section seven, and running thence north forty-three chains to a fence, as it stood in the fall of 1882; thence west along the fence eighty-three chains to a fence; thence south along the fence sixty-three chains; thence east eighty-three chains, and thence north twenty chains, to the place of beginning.

In making their proofs both parties showed title from the United States, and their lands were described by legal subdivisions. The plaintiff did not attempt to show that the fence to which he claimed on the north and west was built upon the lines of the quarter sections as surveyed, but he insists that the court cannot know judicially that it was not so built, and that at any rate the plaintiff has title by prescription to the surplus, and that the defendant must be held estopped from denying that the fence was built upon the true lines.

We think the court does know judicially that under the system adopted by the United States for surveying and marking out its public lands, a quarter section is intended to be just forty chains square, and that whenever a claim is made that a quarter section contains a greater area, affirmative proof must be produced that the lines were so run upon the ground as to include that greater area. Here, in the absence of such proof, the court was justified in saying that the north line of section seven was only forty, and not forty-three chains north of its center.

Upon the questions of prescription and estoppel, it is claimed for the appellant that the fences were built by the owners of the

lands in 1872 or 1873, upon agreed lines, and that the plaintiff's grantor occupied to those lines for about ten years, claiming title, and he thereby acquired title by prescription; that the defendant acquiesced in the lines as fenced, for the same length of time, and thereby became estopped from denying that they were the true lines.

Speaking of the building of the fences, defendant testified: "Neither Tapper," plaintiff's grantor, "nor I knew where the lines were; we hunted around to find the lines; Tapper claimed that the line was where the fences were placed; we agreed that when we ascertained where the lines were we would put the fences upon the lines; the Pearson line varied six or eight feet from the Prentiss line; it was further south; I always claimed to the true line; the fences were not straight; there was a 'jog' of eight feet in one place where the part that Tapper built joined with the part that I built; the fences were not parallel with the true line; they did not run east and west, nor north and south." The statement further shows that "it appeared that the fences on the north side of plaintiff's land diverged all the way from one foot to twenty-two feet from an east and west line; and the fences on the west side diverged from one to eighteen feet from a north and south line."

Tapper was called as a witness for the plaintiff, and denied that anything was said between him and the defendant about changing the lines of the fences if they should afterward ascertain that they were not correct; but the court below evidently believed the defendant, as it found in his favor on every point.

Assuming the defendant's testimony to be true, it is clear, we think, that Tapper, if he had commenced this action, could not have maintained it, either upon the ground of prescription or of estoppel, and we fail to see how the plaintiff can do what Tapper could not. (*Irvine v. Adler*, 44 Cal. 559.)

When the plaintiff purchased, the deed which he received described the land by government quarter sections, and this remained so until the day before this action was commenced, when he took a new deed conveying to him all the land which was in his grantor's possession prior to the date of the first deed. But when this deed was received a part of the fence had been removed, and the plaintiff knew of defendant's claim.

Counsel for appellant cite in support of their views, *Sneed v. Osborne*, 25 Cal. 626; *Columbet v. Pacheco*, 48 Cal. 397; *Moyle v. Connolly*, 50 Cal. 295; *Biggins v. Champlin*, 59 Cal. 113; *Cooper v. Vierra*, 59 Cal. 282; and *Johnson v. Brown*, 63 Cal. 391; but none of these cases are in point here. They hold, as was said in *Johnson v. Brown*, that "where owners of adjacent parcels of land have occupied adversely to each other for more than five years their respective tracts by a division line, which each has recognized and acquiesced in as the true line during all of that time, either is estopped from afterward questioning it as the true line." But here, as the court finds, "the line of said fences was never settled and agreed upon by defendant and plaintiff or his grantors as the true and correct boundary line of their respective tracts of land."

It is not necessary to notice the other points.

We think the judgment and order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9775. Department One.—September 24, 1885.]

FRIEND AND TERRY LUMBER COMPANY, RESPOND-
ENT, v. P. A. MILLER, APPELLANT.

PLEADING—SEPARATE CAUSE OF ACTION—AMBIGUITY.—In an action to recover the price of goods sold and delivered, an allegation that a certain further sum is due as interest does not introduce a separate cause of action, or render the complaint ambiguous, unintelligible, or uncertain.

SALE—FAILURE TO DELIVER—DAMAGES.—A loss resulting to the vendee in a contract of sale from a failure to realize upon a contract with a third person, which was known to the vendor at the time of the sale, held, too remote to be recovered as damages from the vendor for a delay in delivering the goods, although the delay was the cause of the vendee's failure to realize upon his contract.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

Grove L. Johnson, for Appellant.

The evidence of the defendant's loss from the non-delivery by the plaintiff should have been admitted. (*Leonard v. N. Y. etc. Tel. Co.* 41 N. Y. 566; *McHose v. Fulmer*, 73 Pa. St. 365; *Collins v. Baumgardner*, 52 Pa. St. 461; *Parks v. Alta Tel. Co.* 13. Cal. 422; 73 Am. Dec. 589; *Griffin v. Colver*, 16 N. Y. 489; *Baldwin v. Bennett*, 4 Cal. 392; *Milburn v. Belloni*, 39 N. Y. 53; *Roth v. Eppy*, 80 Ill. 283; *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223.)

Young, Young & Dunn, for Respondent.

SEARLS, C.—Action to recover \$1,807.40 for lumber, building material, and piles, sold and delivered by plaintiff to defendant.

Plaintiff had a verdict for \$1,087.90, upon which judgment was entered.

The appeal is taken from the judgment and from an order denying a motion for new trial.

Defendant interposed a demurrer to the complaint, which was overruled.

The demurrer was properly overruled. The pleading after averring the indebtedness of defendant in the sum of \$1,578.97, on account of certain lumber, building material, etc., sold and delivered to defendant by plaintiff between October, 1880, and August, 1882, proceeds to aver that defendant is further indebted in the sum of \$228.43, on account of interest to August 1, 1882, due on said sum.

The interest was but an incident of the principal thing, the debt due to plaintiff.

It did not constitute and was not treated in the complaint as forming a separate cause of action. The simple statement in concise language that a given sum was due for interest up to a given date on the principal sum, did not render the complaint ambiguous, unintelligible, and uncertain in any respect.

At the trial, defendant introduced testimony tending to show that he contracted with plaintiff for certain piles and lumber to be used in pursuance of a contract with the drainage commissioners, which he had agreed to finish within a given time, all of

which was known to plaintiff, who agreed to furnish the same when required. Defendant then offered to prove that plaintiff failed to furnish the piles in time, whereby he was delayed in the completion of his contract and failed to realize the money therefor, which but for such delay he would have received from the State through the drainage commission.

The testimony was offered in various forms, but all tending to the same end, viz., to show that by the delay of plaintiff, defendant was prevented from completing his contract for so long a time that he did not receive his pay from the State, was compelled to borrow money to carry on the "work that the piles were to be used in," etc.

It was objected to this evidence that it was irrelevant, immaterial, and incompetent; that the damages sought to be proven were too remote; that the act under which defendant was acting was invalid, etc.

The objections were sustained and this action of the court is assigned as error.

The damages sought to be proven were not the proximate result of plaintiff's violation of its contract.

Section 3300 of the Civil Code provides that "for the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom."

Rules prescribing the measure of damages based upon such principles of justice and equity as shall be uniform, definite, and exact, are not readily formulated.

We know of no branch of the law in which greater conflict and contradictions exist than are to be found in the adjudicated cases on this subject.

The most that has been or that can be done, is to formulate such arbitrary rules as the subject to which they are applied considered, will in the great majority of cases afford such measure of indemnity as the ends of justice will warrant.

Complete indemnity in its broadest sense cannot and ought not in all cases to be obtained.

To illustrate, the measure of damages on a breach of an

ordinary contract for the payment of money, is the amount agreed to be paid with interest.

It will frequently occur that the payment of principal and interest may fall far short of indemnity.

The creditor from the want of the money may have suffered in his credit or become bankrupt and lost his fortune.

Complete indemnity would require compensation for all such losses.

But to adopt and enforce such a rule would tend to drive all but the reckless and impecunious from all business transactions involving monetary obligations.

For reasons, which on reflection become very apparent, the measure of damages for the "breach of a contract," as it is usually termed, is confined to the amount which will, in the language of the Code, above quoted, "compensate the party aggrieved for all the detriment *proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.*"

The wisdom of the doctrine, as contained in this provision of the Code, has been recognized by most writers upon the subject of damages.

Field, in his work on Damages, section 10, says:—

"To trace remote effects of causes would often be a difficult, if not an impossible task. It would require an infinite mind. Each cause produces results that in turn, alone or by combination with other causes, produces other effects, and so *ad infinitum*. It is a subject too abstruse and complicated for the human mind."

The damages must be proximately caused thereby—that is, such as *next immediately follow and are produced by the act complained of*, or if not thus proximate, such as in the ordinary course of things would be likely to result therefrom.

The case of *Smead v. Foard*, cited at section 254, Field on Damages, illustrates clearly the doctrine we are considering, and the distinction between proximate and remote damages: "The defendant had contracted to deliver a thrashing machine to a farmer within three weeks, knowing it was needed to thrash wheat in the field, but did not deliver it at the time agreed, and after reasonable efforts to secure the crop the plaintiff's wheat was injured by the necessary delay in saving it, and in

consequence of a rain, and he sustained a further damage from a fall in the market price which occurred before it could be kiln-dried and got ready for sale; he was held entitled to recover the loss by the injury to the wheat, but not to the change in the market, as the former loss might well have been in the contemplation of the parties, but not the latter."

The doctrine of that case illustrates what should be the rule here.

Defendant here contracted for piles to be used in the fulfillment of a contract with the drainage commissioners, of all of which plaintiff was aware. By the delay of the latter in delivering the piles defendant suffered loss, was compelled to pay for the use of a pile-driver, lost his time, and sustained other expenses, which he proved, and as the verdict was for less by \$700 than the amount claimed and proved by plaintiff, we may reasonably infer defendant was allowed a deduction on account of the damages thus sustained. He sought, but was prevented from proving, the loss he sustained by failure to collect the money due him from the State.

The failure of plaintiff to deliver the piles in time was a *remote* not a *proximate* cause of defendant's failure to receive compensation on his contract. It is said the drainage act under which defendant was a contractor was declared unconstitutional. Whether defendant failed from this cause or because the fund from which he was to be paid was exhausted, or from any other like cause to receive payment from the State, seems to us unimportant.

This is not a loss "which in the ordinary course of things would be likely to result" from a failure to deliver under the contract.

It was damages which could not well have been contemplated by the parties when they entered into the contract.

The failure of defendant to secure compensation from the State was a result brought about by the interposition of other agencies, dependent upon independent causes over which plaintiff and defendant had no control, and could not have contemplated. It was a loss which, like the change in the market price of wheat mentioned in *Smcad v. Foard, supra*, was too remote to have been contemplated.

We are of opinion the judgment of the court below and the order denying the motion for a new trial should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 11011. Department One.—September 24, 1885.]

WILLIAM INGLIS, RESPONDENT, v. DAVID C. SHEPHERD, APPELLANT.

ELECTION—CONTEST—MISTAKE IN BALLOT.—Under the circumstances of the case, *held*, that the obvious intention of the electors to vote for the contestant for a certain office could not be defeated by a mistake of the printer in the description of the office in the ballots.

APPEAL from a judgment of the Superior Court of the county of San Joaquin.

The facts are stated in the opinion.

J. H. & J. E. Budd, for Appellant.

Smith & Keniston, and *J. C. Campbell*, for Respondent, cited *People v. Love*, 63 Barb. 535; *People v. Cook*, 8 N. Y. 67; *People v. Ferguson*, 8 Cowen, 102; *Att'y-Gen. v. Ely*, 4 Wis. 438; *Ex rel. Spaulding*, 12 Wis. 615; *Ex rel. Golthwait*, 16 Wis. 152; *Joffey v. Edmonds*, 58 Cal. 521; *Kirk v. Rhoads*, 46 Cal. 407.

FOOTE, C. — Wm. Inglis contested D. C. Shepherd's election as supervisor for the first district of San Joaquin County. The court below gave judgment in favor of the contestant, and the respondent appeals therefrom.

The question determining the contention was this, was or was not Inglis entitled to have counted for him as supervisor for the first district of San Joaquin County, sixty-seven ballots, which on their face showed that he was voted for as supervisor for the second district of said county?

The evidence admitted by the court, and which under the circumstances of this case is permissible, was that at the time no other person named William Inglis, except the contestant and his minor son, resided in said county. The contestant was the only person of that name running as a candidate for the office of supervisor of the first district; and that he lived in said district and was the only candidate of his party therein for said office. The board of election all knew those facts. His name, together with the name of the office and the number of the district, were properly printed on the great majority of the ballots voted for him, as issued by the printer employed by his party managers to attend to the matter. By some mistake of that printer, the figure 2 became substituted for the figure 1 on said sixty-seven ballots, and others placed on tables convenient for the use of voters. Some time during the day of election this mistake was discovered, and as far as possible those misleading ballots were destroyed. Before this mistake was discovered those sixty-seven ballots were voted, at the proper precinct of the district, in which contestant was such candidate. And nearly half of them were counted for him by the proper election board, but they refused to count for him some thirty-six of them. Those sixty-seven ballots, with one or two exceptions, were what are called "straight tickets."

Thus it appears that the voters casting the disputed ballots intended to vote for William Inglis for supervisor of the first district of said county. And no fault resting on them we do not perceive the propriety of permitting the carelessness or mistake of a printer to defeat that intention.

The judgment of the court below should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

Hearing in Bank denied.

[No. 9907. Department Two.—September 24, 1885.]

J. E. SIMPSON, APPELLANT, v. G. W. APPEGATE,
RESPONDENT.

EJECTMENT—JURY TRIAL—TENANCY AT WILL—NONSUIT.—In an action of ejectment tried by a jury, where one of the issues was as to whether the defendant was a tenant at will, the evidence on the subject being conflicting, *held*, that a nonsuit could not be granted on a ground which assumed the existence of the tenancy.

APPEAL from a judgment of the Superior Court of the county of Placer, and from an order refusing a new trial.

The facts are stated in the opinion.

C. A. & F. P. Tuttle, for Appellant.

Hale & Craig, for Respondent.

FOOTE, C.—A suit in ejectment for certain lands. The defense set up was an equitable title of the defendant in possession. A jury was impaneled to try the issues of fact in the case. The plaintiff and defendant respectively introduced their evidence, and then the defendant moved for a nonsuit, which was granted by the court, and from its judgment and an order denying a new trial the plaintiff appealed.

The ground upon which the court rendered its judgment was, that by the evidence a tenancy at will was shown in the defendant and no notice had been given him under section 789 of the Civil Code.

There appears to have been a conflict of testimony as to whether the defendant was or was not such tenant, which question should have been submitted to the jury under proper instructions.

For this reason the judgment and order of the court below should be reversed and the cause remanded for a new trial.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded for a new trial.

Hearing in Bank denied.

[No. 9863. Department One.—September 25, 1885.]

D. H. ARNOLD, ASSIGNEE, ETC., OF JOHN LAWSON, AN INSOLVENT, RESPONDENT, v. JACOB KAHN, APPELLANT.

INVOLUNTARY INSOLVENCY—EFFECT OF ADJUDICATION.—An adjudication of a debtor to be an involuntary insolvent is a decree *in rem* as regards the status of the debtor.

ID.—ORDER TO SHOW CAUSE—SERVICE BY PUBLICATION—RIGHTS OF ASSIGNEE.—The notice to the debtor required by section 10 of the Act of 1880, to show cause why he should not be adjudged an involuntary insolvent, may be served on him by publication with the same effect, so far as the rights of the assignee are concerned, as if a personal service had been made.

APPEAL from a judgment of the Superior Court of Colusa County, and from an order refusing a new trial.

The facts are stated in the opinion.

John T. Harrington, for Appellant.

The court in the insolvency proceedings did not acquire jurisdiction over the person of the debtor by the publication of the order to show cause. (*Pennoyer v. Neff*, 95 U. S. 714; *Webster v. Reid*, 11 How. 437.)

Jackson Hatch, for Respondent.

Proceedings in involuntary insolvency are *in rem*; and an adjudication of insolvency founded upon a service by publication is valid. (Freeman on Judgments, § 606; *Michaels v. Post*, 21 Wall. 398; *Shawhan v. Wherritt*, 7 How. 643; *Pennoyer v. Neff*, 95 U. S. 723; *Cooper v. Reynolds*, 10 Wall. 308.)

FOOTE, C.—Action by an assignee to recover from a purchaser the value of goods bought from an involuntary insolvent previous to adjudication as such, the sale being in violation of the provisions of the Act of 1880.

The only point made or relied on by the appellant in his brief is that service of notice to show cause made upon the insolvent by publication, was insufficient in law to uphold an adjudication of involuntary insolvency.

He insists that in such a case personal service was necessary, and in his brief virtually concedes that all the proceedings

were regular, and according to the requirements of that act, but claims they were not *in rem*, and that the adjudication of the status of the insolvent was *in personam* and void, and the contention of the plaintiff in this action without legal support.

We understand the proceedings such as were had against Lawson to have for their object the fixing of his status as an insolvent, and the reaching of his property as such, and its distribution ratably among his creditors.

The law under examination is similar to the late bankrupt law of the United States, and it has been declared by the federal judicial tribunals that "a decree adjudging a debtor to be a bankrupt is in the nature of a decree *in rem* as respects the status of the party." (*Michaels v. Post*, 21 Wall. 398.)

In *Pennoyer v. Neff*, 95 U. S. 723, the Supreme Court of the United States, while affirming personal service to be necessary in that case, distinctly stated that the principle there contended for did not affect cases "where the object of the action is to reach and dispose of property in the State," and said "such service," meaning that by publication, "may answer in all proceedings which are substantially *in rem*." And this ruling has been followed by this court in *Belcher v. Chambers*, 53 Cal. 639.

An adjudication of a debtor to be an involuntary insolvent is like a decree of the same nature under the bankrupt law above mentioned, and may properly be considered as *in rem* as regards the status of such debtor; and publication of the notice required by section 10, Act of 1880, is sufficient.

The debtor's status being thus legally fixed, the right to recover and distribute his property and rights in action, etc., accrues to the assignee, and he may prosecute actions against and have recovery from parties under said act in the same manner as if personal service prior to the order adjudicating his status had been had on the debtor.

There is no error shown by the record, and the judgment and order denying a new trial should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9798. Department One.—September 25, 1885.]

MEHITABLE W. LOWDEN, APPELLANT, v. FRED-
ERICK FREY ET AL., RESPONDENTS.

WATER RIGHTS—JUDGMENT—NEW TRIAL—EVIDENCE—FINDINGS.—The matters in issue related to the rights of the respective parties to the waters of a certain stream. The judgment determining such rights and an order refusing a new trial affirmed on the evidence and findings of the court.

APPEAL from a judgment of Trinity County, and from an order refusing a new trial.

The facts are stated in the opinion.

W. J. Tinnin, and *Burch & Lowenberg*, for Appellant.

C. E. Williams, *J. W. Philbrook*, and *Hatch & Chadbourne*, for Respondents.

SEARIS, C.—This is an action to fix and determine by a decree of court conflicting rights of plaintiff and defendants to the water of Grass Valley Creek and its tributaries, to enjoin defendants from interference with the water adjudged to belong to the plaintiff, and to recover damages.

Plaintiff's grantors in 1850 located what is now known as the Lowden Ranch, situated in Trinity County, and through which a stream known as Grass Valley Creek flows. The ranch was situated upon public lands of the United States.

In 1852 a ditch was constructed from the creek, and the waters thereof diverted and conducted through said ditch to the ranch, and there used for purposes of irrigation.

In 1854, defendant Frederick Frey and others constructed a ditch from Grass Valley Creek at a point above that of plaintiff, and extending to Ohio Flat and other points on Trinity River, for mining purposes. This last ditch is known as the Ohio Flat Ditch.

The main issue at the trial was as to the extent of plaintiff's prior right to the water of said creek. Plaintiff had a decree adjudging her prior right to the use of 120 inches of water measured under a four-inch pressure, from which decree and from an order denying a motion for a new trial she appeals.

The contention of appellant is that she was entitled to a decree establishing her right to a much larger quantity of water than that adjudged her by the court, and that she was entitled to damages for past diversion of water by defendants. The prior right of plaintiff to forty inches of water is admitted by the pleadings.

At the trial it was stipulated in open court, by counsel for the respective parties, that "the evidence be confined to the issue upon the quantity of water appropriated by, and to which each of the respective parties is entitled, and to the question of damages, and that all other issues, if any, raised by the pleadings be ignored."

The testimony as to the extent of plaintiff's prior right to the water, involved as substantial and radical a conflict as can well be imagined. It ranged, according to the statements of different witnesses, from thirty-six inches to sixteen hundred inches.

A certain ditch known as the Skinner Ditch, and having a large capacity, is described by some of the witnesses, and its very existence ignored by others.

This marked conflict may be accounted for in part by the fact that the witnesses were detailing from memory facts and circumstances occurring thirty years prior to the time at which they were called upon to testify.

Again, the tendency of all water ditches is to increase in size and capacity by age. The constant erosion of their banks by the current of the water flowing through them, tends in some degree to their enlargement. The fact that debris, deposited from this source, and in many instances brought from other sources and deposited in such ditches, is necessarily removed in cleaning them, and is usually deposited upon the lower bank of the ditch, thus imperceptibly increasing its carrying capacity. All these circumstances are or may well be overlooked by honest witnesses, who only remember that in their observation a given ditch has never at any time been specially enlarged, and when coupled with the fact that the increase in size is so gradual as not to attract particular attention, goes far toward explaining the very great discrepancy usually observed among witnesses, when testifying as to the capacity of ditches of long standing.

With this substantial conflict of testimony, and involving, as it does, so many elements of uncertainty, we are not at liberty to disturb the findings of the court below, by which the conclusion was reached, that plaintiff had a prior right to but 120 inches of water.

It is objected by plaintiff that there is a conflict between the seventh and eighth findings of the court, and that the latter is in direct conflict with the testimony.

The seventh finding is to the effect that defendants threaten, and will continue to divert the water from said Grass Valley Creek in derogation of plaintiff's right to 120 inches of the first flow thereof, etc.

The eighth finding is that plaintiff has sustained no damage by reason of the acts of the defendants.

The court had previously found in its sixth finding that the defendants had always permitted 120 inches of water to flow to plaintiff's ditch when the creek afforded that quantity, except from July 14 to August 14, 1883, when they permitted but forty inches so to flow.

The testimony of Bates, a witness for plaintiff, shows that during this same month, from July 14 to August 14, 1883, 123 to 125 inches of water actually flowed in the ditch of plaintiff, which was a larger quantity than the court finds it was entitled to receive, for which reason, as we suppose, it was found plaintiff was not damaged.

The apparent discrepancy in the finding that defendants only permitted forty inches of water to flow during the month indicated, while plaintiff was, in fact, using a much larger quantity, is explained by the testimony of defendant Frey and others, from which it appears that while defendants denied the right of plaintiff to over forty inches of water, they in practice allowed a larger quantity to flow, when they were not using it themselves, and that plaintiff was in the habit of *taking it*, without reference to the claim of defendants.

In other words, the defendants denied plaintiff's right to any quantity of water exceeding forty inches, and sought to deprive her of all above that quantity, hence the sixth and seventh findings. They did not succeed in depriving her of the water, as they sought to do, and she was not damaged, hence the eighth finding.

The findings are not as clear and explicit as they might have been, but we cannot see that injustice has been done the plaintiff.

The decree in plaintiff's favor entitled her to costs of the action; therefore the question of her right to nominal damages was of no practical importance in the case. (*Chambers v. Frazier*, 29 Ohio St. 362.)

The testimony tends to show that the appropriation of the water by defendants and their grantors was for mining purposes generally, to be used at various points. Under such circumstances, the position of plaintiff that "the right to the use of water for mining purposes ceases with the exhaustion of the mine for which it was appropriated" has no application.

We find nothing in the errors of law assigned to warrant a reversal of the judgment or order denying a new trial, and are of opinion they should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9821. Department One.—September 25, 1885.]

A. BULLARD, RESPONDENT, v. CHARLES STONE,
APPELLANT.

CONTRACT FOR THE SALE OF PERSONAL PROPERTY—BREACH OF BY SELLER—MEASURE OF DAMAGES.—The measure of damages in an action by the buyer against the seller to recover for the breach of a contract for the sale and delivery of personal property is prescribed by sections 3308 and 3354 of the Civil Code.

ID.—MONEY PAID TO THIRD PERSON.—In such an action, money paid by the plaintiff to a third person, in pursuance of the contract, may be recovered from the defendant.

NEW TRIAL—INCOMPETENT EVIDENCE.—The admission of incompetent evidence, if not objected to at the trial, cannot be assigned as error on a motion for a new trial.

INSTRUCTION NEED NOT BE REPEATED.—The refusal to give an instruction which has already been given in substance is not error.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order refusing a new trial.

The facts are stated in the opinion.

John F. Ellison, and Hart & White, for Appellant.

The measure of damages in this action is the excess of the value of the property to the buyer over the amount which would have been due the seller under the contract if it had been fulfilled. (Civ. Code, § 3308.) The value to the purchaser is the market value, and in determining that value, evidence as to the price for which plaintiff thought he could have purchased similar wheat in the neighborhood was inadmissible. (*Dana v. Fiedler*, 2 Kern. 41; 62 Am. Dec. 130; *Tobin v. Post*, 3 Cal. 373; *Crosby v. Watkins*, 12 Cal. 85; *Hillebrant v. Brewer*, 6 Tex. 45; 55 Am. Dec. 757; *Dey v. Dox*, 9 Wend. 129; 24 Am. Dec. 137.)

F. C. Lusk, for Respondent.

SEARLS, C. — This action is brought to recover damages for violation of a contract to sell and deliver a quantity of wheat. Cause tried by a jury. Verdict and judgment in favor of plaintiff for \$2,000. A motion for new trial was made and denied. The appeal is from the judgment and from an order denying a new trial.

On or about the 5th of December, 1882, the defendant entered into a contract with plaintiff for the sale and delivery by the former to the latter of 7,976 sacks of wheat, aggregating 1,097,161 pounds.

At the date of the contract 4,400 sacks, containing 602,800 pounds, were at Squaw Hill. A further quantity of 1,045 sacks, containing 148,390 pounds, and constituting a separate lot of wheat, was also at Squaw Hill. One thousand two hundred and forty-six sacks, containing 167,490 pounds, were at Willows, and the remainder, consisting of 1,285 sacks, containing 178,481 pounds, at McIntosh Landing, all of which places are in Colusa County.

The wheat was to be paid for on delivery at the rate of \$1.47½ per hundred for the two lots at Squaw Hill and at the rate of \$1.50 per hundred for the residue. The wheat at Willows and the smaller lot of 1,045 sacks at Squaw Hill were delivered to plaintiff and paid for by him. The wheat was in warehouses, and two receipts had been issued therefor, one of which was held

by a bank and the other by one H. Kraft. At the date of the contract plaintiff received an order for these warehouse receipts from defendant. It was agreed that plaintiff should pay all warehouse charges on the grain and deduct the amount so paid from the purchase price.

He paid \$200 on this account, and also expended \$175.71 in necessary repairs to sacks and in resacking some of the grain preparatory to shipment.

The attack of appellant upon the verdict of the jury is two-fold: *First*, he contends that the evidence failed to establish the necessary facts upon which to predicate a proper verdict for damages in such a case; and *second*, that conceding the propriety of the verdict for some amount, it should not have exceeded \$1,575.

Section 3308 of the Civil Code is applicable to this case, and is as follows:—

“The detriment caused by the breach of a seller’s agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer over the amount which would have been due to the seller under the contract, if it had been fulfilled.”

What is meant by the excess of the value of the property to the buyer is defined by section 3354 of the Civil Code, as follows: “The value of property to a buyer or owner thereof, deprived of its possession, is deemed to be the price at which he might have bought an equivalent thing in the market nearest to the place where the property ought to have been put into his possession, and at such time after the breach of duty upon which his right to damages is founded, as would suffice with reasonable diligence for him to make such a purchase.”

The rules as formulated by these sections of the Code are not materially different from those understood to have existed prior thereto.

The market value of merchandise was said to be the measure of damages in cases of refusal to deliver upon contract where payment had been made, and where payment had not been made the excess of the market value over the price agreed to be paid was deemed the measure of damages.

By the market value was meant the price or sum for which an equivalent could be reasonably and fairly purchased at or near the place where the property should have been delivered, and within a reasonable time after refusal to deliver.

The testimony as to value of wheat was furnished by plaintiff and C. B. Hobart, both grain buyers at the very points where the wheat in question was to have been delivered. Plaintiff after stating that for fourteen years he had been a grain buyer, and explaining as to the grade of the wheat in question, proceeds to say: "On December 8, 1882, I do not think I could have bought an equivalent lot of wheat for less than \$1.85 to deliver it at San Francisco, which would leave it \$1.68 $\frac{1}{4}$ at Squaw Hill, or \$1.70 at McIntosh's, or \$1.72 $\frac{1}{2}$ at Willows; after I was refused that wheat on the 7th and 8th, if I had started out using reasonable diligence as a grain buyer would in the market or markets nearest this place, Squaw Hill, in that market or markets nearest to it, I don't think I could have bought an equivalent lot of wheat—by equivalent I mean equivalent in quantity and quality—for less than \$1.85 per cental delivered at San Francisco, or that is \$1.68 $\frac{1}{4}$ at Squaw Hill, and \$1.70 at McIntosh's."

The witness Hobart testified to much the same effect, giving the prices at Squaw Hill and the markets nearest it, and also at San Francisco, and later in his testimony explained that "it was worth from \$1.80 to \$1.85 in San Francisco; and after deducting freights that would make it worth \$1.67 to \$1.67 $\frac{1}{4}$ at Squaw Hill."

We need not expect nor is it essential that witnesses testifying should clothe their ideas in those precise terms usually employed in pleading. They are expected to state such facts as are within their knowledge in their accustomed forms of expression, and from the language used, the idea is gained.

When the witnesses Hobart and Bullard stated *they did not think* wheat at a given point could be bought for less than a given price, and at the same time showed themselves informed as to the price, it was perfectly natural and proper for the jury to infer that the sum mentioned was the price, as well as the lowest price at which it could be purchased.

So, too, when they stated the market value of the commodity in San Francisco, the freight from the place of contract to San

Francisco, and that the price therefor at the place of contract was as stated, and being the San Francisco price less the freight, a jury would very naturally conclude that the San Francisco market regulated the price or market value of the article in the interior, and that at the latter point the market value was the price of the article at the former, less the cost of shipment to the central market.

These forms of expression may not always convey the exact information from which to infer the fact to be determined, but they will usually be found sufficient, and in the absence of other factors, which, if wanting, it is the province of a cross-examination to develop, will be deemed sufficient.

Our language as a vehicle to convey ideas is not in all respects perfect. Witnesses are not always logicians or elocutionists, but we may ordinarily rely upon their capacity to make themselves understood, and that being comprehended, the practical good sense of the jury-box will usually result in correct conclusions from their utterances.

We see no error in the basis assumed for determining the damages, or in the agency through which a result was reached, or in the result itself.

It is further urged that conceding the validity of the verdict to the extent of \$1,575, it cannot be sustained as to the residue.

The complaint claimed that \$200 was paid by plaintiff on account of the purchase price of the wheat, and that he incurred an expenditure of \$175.71 for sacks and in resacking the wheat not delivered.

The evidence tended to show that the sum of \$200 was paid not to defendant, but to one of the warehousemen on account of storage of the wheat, that it was paid in pursuance of the contract, which provided the plaintiff should pay storage and deduct the amount thereof from the purchase money.

It also appeared that the charges for storage were subsequent to suit brought, paid by the party who received the wheat, and that the warehouseman still holds the \$200 paid him by plaintiff. This sum of money having been paid by plaintiff under the contract, and in obedience to its requirements, he is clearly entitled to recover it from defendant.

It was not paid under a mistake of fact. The warehouseman was entitled to his storage. Plaintiff was bound by his agree-

ment to pay it, and did pay this amount. There was nothing voluntary about it, and plaintiff was not entitled before suit brought to recover it back from the warehouseman, and the contract having been broken by defendant, he became liable for this sum paid on account thereof.

As to the item of \$175.71, the evidence tended to show that this sum was necessarily expended by plaintiff in preparing the wheat not delivered for shipment. As the wheat was never delivered to plaintiff, this item, if objected to at the proper time, would doubtless have been excluded, but no objection was raised, so far as we can see, to it until a motion for a new trial. The complaint contained an allegation of this expenditure. It might have been stricken out on motion, as forming no proper basis for special damages in a case where the property had never been delivered to plaintiff, and in which he consequently had no right to expend money upon it. Again, the testimony might have been objected to at the trial and ruled out, or a refusal so to do assigned as error. No such motion or objection was made.

A party cannot be permitted, under such circumstances, and after tacitly consenting to the introduction of testimony, to assign its admission as error.

The instructions given by the court, at request of plaintiff, stated the law correctly as applicable to the case.

Defendant's instructions, with a single exception, were erroneous and did not properly state the law as applicable to the testimony.

The last instruction, though subject to some verbal criticism, was in the main correct, and might with propriety have been given, but having already been given to the jury in ampler form, and free from all objection, we are of opinion defendant sustained no injury by its refusal.

Upon the whole case as presented we are of opinion the judgment of the court below and the order denying the motion for a new trial should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in Bank denied.

[No. 9644. Department One.—September 25, 1885.]

S. H. AXTELL, RESPONDENT, v. LOUIS GERLACH ET AL.,
APPELLANTS.

TAXATION—SALE FOR EXCESSIVE AMOUNT.—A tax sale for one dollar in excess of the amount authorized by law is void.

ID.—LANDS SUBJECT TO OVERFLOW—ACT OF APRIL 15, 1880—ILLEGAL CHARGES.—On a sale for taxes levied under the Act of April 15, 1880, providing for the protection of lands subject to overflow, an item of fifty cents for the cost of preparing the delinquent list, and an item of fifty cents for the cost of the certificate of sale, included in the amount for which the sale was made, are illegal charges, and fatal to the validity of the sale.

ID.—INJUNCTION TO RESTRAIN EXECUTION OF DEED.—In such a case, the execution of a deed to the purchaser will be restrained by injunction, for the reason that the items included in the amount for which the sale was made are not required to be specified therein.

ID.—QUIETING TITLE—CANCELLATION OF CERTIFICATE OF SALE—JUDGMENT.—Assuming that the deed when executed would show the invalidity of the sale, the owner of the land may maintain an action to quiet his title and cancel the certificate to the purchaser, and a judgment granting such relief, and also enjoining the execution of a deed, will not be reversed because the deed would cast no cloud upon the title.

APPEAL from a judgment of the Superior Court of San Joaquin County.

The action was brought to quiet the title of the plaintiff as against the holder of a certificate of sale for taxes, and to restrain the execution of a deed founded thereon. The land in controversy was within the boundaries of a protection district formed under the Act of April 15, 1880, and the tax was levied in pursuance thereof. The judgment ordered the cancellation of the certificate of sale, and restrained the tax collector from executing a deed. The further facts are stated in the opinion.

J. C. Campbell, and *D. S. & S. L. Terry*, for Appellants.

J. B. Hall, and *W. L. Dudley*, for Respondent.

FOOTE, C. — Action to quiet title. Appeal from a judgment made therein.

The certificate of sale issued by the tax collector was properly ordered to be canceled; the sale was void because the land was sold for a sum greater by one dollar than was authorized by law. (*Harper v. Rowe*, 53 Cal. 236; *Treadwell v. Patterson*, 51 Cal. 637.)

There was nothing in the law which imposed a tax *in invitum* upon property, which gave the right to charge this additional sum, viz., fifty cents for cost of preparing a delinquent list, and fifty cents for cost of certificate of sale. (See "act to provide for the protection of lands from overflow other than lands recognized as swamp lands." Stats. 1880, ch. 128, p. 227.)

Those two charges were not authorized as a part of the manner in which the sale was ordered to be made. (§ 9 of said act, and *Bucknall v. Story*, 36 Cal. 67.) And further, that act itself in section 11, makes express provision for the payment of the tax collector, and does not seem to contemplate that the land-owner or his property shall be responsible therefor. And the purchaser was not entitled to a decree ordering the land-owner to reimburse him for money paid out. (*Harper v. Rowe*, *supra*.)

It is contended that the certificate of sale being void upon its face the deed, the making of which it was sought to enjoin, would be void on its face, and therefore an injunction ought not to have been granted, as no cloud on plaintiff's title would thereby appear.

Section 3776 of the Political Code does not require that the certificate of sale shall specify the particulars of the "amount paid," or the "amount of the assessment." *Non constat*, therefore, that the deed would necessarily do so if executed, and if it did not, then evidence would be required *dehors* the recitals of the deed to ascertain the illegality of any of the items, to collect which the sale was made, and a cloud would thus be cast on the title.

But upon the supposition that the deed itself when executed may properly show the purchaser's title to be void and no actual cloud rest on the plaintiff's title, yet under section 738 of the Code of Civil Procedure, this action to cancel the certificate is a proper one. (*Hearst v. Egglestone*, 55 Cal. 365; *Harper v. Rowe*, *supra*; *People v. Center*, 66 Cal. 551.)

The injunction is for the purpose of making effective the judicial determination of the invalidity of the defendant's adverse claim, "of an estate or interest in" the plaintiff's land. And as a means to attain that end and prevent further controversy if the deed should be executed and delivered, the injunction was granted and the judgment should not be reversed on that account. (*Brooks v. Calderwood*, 34 Cal. 563.)

It would serve no useful purpose to determine other questions raised in the case, and we are of opinion that the judgment of the court below should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is affirmed.

[No. 9820. Department Two.—September 25, 1885.]

THE BOSTON TUNNEL COMPANY, RESPONDENT, v.
ADAM MCKENZIE ET AL., APPELLANTS.

NEW TRIAL—INSUFFICIENCY OF EVIDENCE—JUDGMENT—DECISION.—A motion for a new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, nor on the ground that the judgment is against law. The motion should be directed to the decision and not the judgment.

ID.—NOTICE—FINDINGS.—A notice of motion for a new trial, which specifies as a ground for the motion insufficiency of the evidence to support or justify the findings, is a valid notice under section 657 of the Code of Civil Procedure.

ATTORNEY—AUTHORITY TO PROSECUTE ACTION PRESUMED—DISMISSAL.—An action regularly instituted by an attorney is presumed to be with the consent of the plaintiff; and until his want of authority is established, the defendant cannot have the action dismissed by showing that the plaintiff does not desire to maintain it, the attorney opposing the dismissal.

CORPORATION—HOW EXISTENCE PROVED.—In an action by a corporation brought in the county in which its original articles of incorporation are filed, a copy certified by the secretary of State of the certified copy of such articles on file in his office is admissible in evidence to prove the organization of the corporation.

ID.—OFFICER—STOCKHOLDER—PAROL EVIDENCE.—A question arose incidentally as to whether a witness for the corporation was an officer and stockholder. *Held*, that parol evidence was competent to prove the fact.

TAXATION—SALE FOR EXCESSIVE AMOUNT—JURISDICTION.—A tax sale for an amount in excess of what is lawfully chargeable is without jurisdiction and void.

JURY TRIAL—WHEN WAIVED.—In an action at law, a jury is waived, if on the day set for the trial the parties appear, and a trial is had before the court without objection.

APPEAL from a judgment of the Superior Court of Tuolumne County, and from an order refusing a new trial.

The facts are stated in the opinion.

F. D. Nicol, for Appellants.

Street & Street, and *E. A. Rodgers*, for Respondent.

SEARLS, C. — Ejectment to recover a mining claim. Plaintiff had judgment.

Plaintiff is a corporation. In 1877 the demanded property was assessed for the purpose of taxation, to the Boston Tunnel Company. The taxes under such assessment not having been paid, the mining claim was sold on the 2d day of March, 1878, by the tax collector, to John Reister, who received a certificate of sale, and in due time a tax deed of the premises, under which he entered into possession. Defendants hold under the title thus acquired.

Defendants appeal from the final judgment and from an order denying a motion for new trial.

Respondent objects to a consideration of the statement on motion for new trial, on the ground that the notice of motion was to the effect that appellants would ask the court to vacate the judgment herein, and as one of the grounds of the motion specified the "insufficiency of the evidence to justify the judgment, and that it is against law."

Objection was made at the proper time and in the court below, to the sufficiency of the specifications as a foundation for the motion. *Martin v. Matfield*, 49 Cal. 42, and *Sawyer v. Sargent*, 65 Cal. 259, are relied upon to sustain the objection.

In the case first above cited it was said: "Insufficiency of the evidence to justify the judgment is not a ground of motion for a new trial. Such a motion is not directed at the judgment, but at the verdict, or other decision of fact, for a new trial is a re-examination of an issue of fact. (Code Civ. Proc. § 656.) That a judgment is against law is not ground for a motion for a new trial."

In *Sawyer v. Sargent*, it was held that a motion for new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, nor can it, says the court, be based on the ground that the judgment is against law. The motion should be directed at the decision, and not the judgment.

It follows that in the present case the motion so far as it is urged against the judgment is irregular.

We find, however, that the fourth specification in appellants' causes, for asking for a new trial, is as follows: "Insufficiency of the evidence herein to support or justify the findings of the court."

This specification is sufficient in form, and is directed to the decision as required by section 657 of the Code of Civil Procedure.

The answer of defendants after denying plaintiff's ownership and right to possession of the demanded premises, and setting up title in themselves, proceeds to set out that the action is not prosecuted by the consent of the Boston Tunnel Company (a corporation); that it is not the wish of the company that the action should be maintained; that by order of the trustees of said Boston Tunnel Company, a motion was made for the dismissal of the action; that L. Pierce is not, and for many years has not been, the secretary of the plaintiff; that the complaint is not verified by any officer of the corporation, and other allegations of like import, all of which were, on motion, stricken out by the court, and this action is assigned as error. The complaint is signed and the action prosecuted by Street & Street and Edwin A. Rodgers as the attorneys for plaintiff. Their right to institute an action and to conduct the same to determination in the court is not challenged. Until that is done, we cannot presume that an action regularly instituted by them as attorneys is without the sanction of their client, the plaintiff, and the novel proceeding taken by the defendants to dismiss the action by showing that the corporation plaintiff does not desire to maintain it, while the attorneys of plaintiff, who alone can speak for it in court, are opposing such dismissal, cannot be upheld, and the court was right in striking out that portion of the answer.

There was no error in admitting in evidence "the certified copy of the certified copy of the articles of incorporation of the Boston Tunnel Company."

By section 299 of the Civil Code such certified copy of the certified copy, required to be filed with the county clerk in order to enable a corporation to maintain certain actions, is made evidence equally with the original. It is not in any sense secondary evidence, but is by law made equal in all respects with the original, as evidence.

If it be urged that the county of Tuolumne is the county in which the original articles of incorporation were required to be filed by the corporation plaintiff, that section 299 of the Civil Code makes no provision for filing the copy of the copy of articles in the county where the original articles are filed, and

therefore that the certified copy from the clerk's office of Tuolumne County was not admissible in evidence, we may admit the proposition, and what follows?

Why, simply, that there was in Tuolumne County, where the original articles are filed, no necessity for filing a copy of the articles of incorporation duly certified by the secretary of State. By section 297 of the Civil Code a copy, certified by the secretary of State, is made evidence of the facts therein stated, and if for any purpose it became, or was, proper to prove the organization of the corporation, this copy of a copy, so certified, was proper evidence by which to do so.

The fact that it had been filed in the office of the county clerk of Tuolumne County, where it had no need to be filed, did not militate against it as evidence. If not relevant to any issue made in the pleadings its introduction could do no harm to appellants.

Objection is made that one L. Pierce, a witness, called on the part of plaintiff, was permitted to testify that he was a stockholder in the corporation plaintiff, and the secretary thereof. The objection is based upon the fact that the evidence is secondary, the records of the corporation being the best evidence of the facts stated.

The witness was called to prove possession of the demanded premises by defendants, the amount of money expended thereon by plaintiff, and other acts tending to show its prior possession. The fact of his being a stockholder and secretary were doubtless called out for the purpose of showing his position to have been such as to give him opportunities for knowing the property concerning which he testified. Coming thus incidentally in the case, whether for the purpose of identifying the witness, or showing his opportunities for acquiring knowledge, it was not necessary to resort to the records of the corporation to prove the facts against which appellants' exception is directed. It was proper for such purpose to propound the questions and show by the answers that the witness was a *de facto* officer and stockholder in the corporation.

The answer of defendants, that the action was not commenced and is not prosecuted by the direction or with the consent of the Boston Tunnel Company, having been stricken out by the

court on motion, there was no error in refusing to permit defendants to introduce evidence tending to prove the defense thus stricken out.

Defendants offered in evidence as a part of their chain of title to the demanded premises, a certificate of sale by the tax collector and a tax deed of the premises. These were admitted, subject to be stricken out, and before the cause was finally submitted were stricken out by the court. In this there was no error.

The certificate shows that for the year 1877 the demanded property was assessed to Boston Tunnel Company, and valued at \$550. It recites the rate of taxation and the amount of the tax at \$14.58, the addition of five (5) per cent, and making the total amount thereafter due for State and county taxes \$15.30. It then recites that John Reister was the bidder who offered to take, etc., "and pay the taxes and costs due thereon, including \$2 for this certificate, amounting in all to \$25.31." That the property was thereupon struck off to him for said taxes who paid the full amount of said taxes, costs, and charges, and therefore became the purchaser.

The description of the property is as follows:—

"Possession of interest and claim to Grant Mine in District No. 2, in Table Mountain, near Jeffersonville; bounded east by the Rosedale Ranch, north by the Down East Claim, south by D. T. Hughes & Co.'s Mine; containing about 3,000 feet, and known as the Boston Tunnel Mine; improvements thereon consisting of whim-house and car."

The sale occurred March 2, 1878, and the certificate is dated March 4, 1878.

By section 3776 of the Political Code, the certificate of sale is required to be "dated on the day of sale, stating (when known) the name of the person assessed, a description of the land sold, the amount paid therefor, that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed."

Section 3786 of the same Code provides that "the matters recited in the certificate of sale must be recited in the deed."

The tax deed fails to recite the amount for which the property was assessed. In reference to the sum for which it was sold, it

first recites that the tax with five per cent added was \$15.30, and that the property was struck off and sold to John Reister for the sum of \$15.30, the said John Reister being the only person who would . . . and pay the amount of said taxes, five per cent costs and accruing costs, amounting to the sum of \$37.96, being the price paid for the same.

We think it is apparent from the certificate of sale and tax deed taken together:—

First—That the tax was \$15.30, and *second*, that the property was sold for a sum greatly in excess thereof. Whether for \$25.31, as specified in the certificate, or for \$37.96, as specified in the deed, matters not.

In *Treadwell v. Patterson*, 51 Cal. 637, it was held that a sale for anything more than is lawfully chargeable is a sale without jurisdiction, and therefore void. *Bucknall v. Story*, 36 Cal. 67, is to the same effect.

Tested by the rule laid down in those cases, the sale was void.

The other objections to the deed and certificate of sale need not be noticed.

The objection that the cause was tried by the court without a jury comes too late.

The cause was by consent of counsel set down for trial on a day certain. On that day counsel for defendants appeared and the cause was tried by the court without objection, and without a jury having been demanded. A jury was thereby waived. (*Greason v. Keteltas*, 17 N. Y. 491; *Black v. White*, 37 N. Y. 320; *Bradley v. Aldrich*, 40 N. Y. 504; *West P. F. v. Reymert*, 45 N. Y. 703; *Lewis v. Mott*, 36 N. Y. 395.)

We find nothing in the other objections urged requiring attention, and are of opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C. concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9910. Department Two.—September 25, 1885.]

MIRIAM P. REED, BY W. K. REED, HER GUARDIAN
AD LITEM, APPELLANT, v. EDWARD M. DRAIS, RE-
SPONDENT.

PLEADING—DEMURRER TO PART OF A CAUSE OF ACTION.—A demurrer cannot be interposed to part of a cause of action or defense. If the part demurred to is irrelevant or immaterial, a motion to strike out may be made, but a demurrer must go to the whole cause of action or defense.

EVIDENCE—VALUE OF LAND—OPINION OF WITNESS.—A witness called upon to give an opinion as to the value of land must lay a proper foundation by showing that he possesses the means to form an intelligent opinion; but it is not essential that his knowledge should be derived from any peculiar skill in a particular pursuit or branch of business or department of science.

PRACTICE—NEW TRIAL—CUMULATIVE EVIDENCE.—A new trial will not be granted on the ground of newly discovered evidence, where such evidence is merely cumulative.

APPEAL from a judgment of the Superior Court of Stanislaus County, and from an order refusing a new trial.

The facts are stated in the opinion.

Byers & Elliott, for Appellant.

Campbell & Munter, and *W. E. Turner*, for Respondent.

SEARLS, C. — This is an action by Miriam P. Reed, an infant, by her guardian *ad litem*, W. K. Reed, to quiet title to certain land. Plaintiff claims that the land in controversy was conveyed to her by a sister. That the grantor, before the deed was recorded, went to the office of the county recorder and took the deed therefrom, and sold and conveyed the same land to defendant, and that defendant had notice of such previous conveyance at the date of the sale and conveyance to him. Defendant denied all notice of a previous conveyance by his grantor and denied plaintiff's title. The cause was tried by the court, findings waived, and judgment entered for defendant. Plaintiff moved for a new trial, which was denied, and this appeal is prosecuted from the judgment and order denying a new trial.

The demurrer to a portion of the amendments to defendant's answer was properly overruled.

A demurrer cannot be interposed to a part of a cause of action or defense. If irrelevant or immaterial, a motion to strike out

may be interposed; but a demurrer, to avail anything, must go to the whole cause of action or defense.

In the absence of a showing as to the materiality of the testimony sought to be introduced in reference to the value of the land, we cannot say the plaintiff was injured by the refusal of the court to permit W. K. Reed and E. Olmstead to testify as to such value.

Conceding that the testimony may have been admissible, the witnesses offered failed to show themselves possessed of the requisite knowledge to authorize them to testify as to the value of the land.

"Where a witness is produced to testify in the character of an expert, as to the value of property, it should appear that he has some special skill or experience, or peculiar knowledge of the value of the class of property about which it is proposed to question him, such skill or knowledge having been acquired by him in the line of his profession or business." (Rogers on Expert Testimony, § 154.)

According to Wharton on Evidence, section 447, two essentials are requisite to a proper estimate of value:—

"*First*—A knowledge of the intrinsic properties of the thing.

"*Secondly*—A knowledge of the state of the market.

"As to such intrinsic properties as are occult and out of the range of common observers, experts are required to testify; as to the properties which are cognizable by an observer of ordinary business sagacity, being familiar with the thing, such an observer is permitted to testify."

A witness called upon to give an opinion on the subject of value, whether offered as an expert or not, must lay a proper foundation for the introduction of his opinion, by showing he possesses the means to form an intelligent opinion, "derived from an adequate knowledge of the nature and kind of property in controversy, and of its value."

We may assume the residence of the witnesses in the vicinity of the property in question, and their pursuits, to have given them a reasonable opportunity to become acquainted with the nature and kind of land in dispute, but it does not follow, and their testimony does not show them to possess any such knowledge as to its value, as to warrant them to give an opinion on

that subject. (*Whitney v. City of Boston*, 98 Mass. 315; *Tecrpenning v. Corn Ex.* 43 N. Y. 279; *Clark v. Rockland*, 52 Me. 68; *Haight v. Kimback*, 51 Iowa, 13.)

There is no doubt that a witness acquainted with the value of property may give an opinion as to such value, but he must first be shown to possess the requisite knowledge, and then, although such knowledge is not the result of any peculiar skill in a particular pursuit or branch of business, or department of science, he may yet be heard. Where, however, the knowledge is wanting the opinion should be rejected. We think, therefore, the court did not err in refusing to admit the testimony.

The motion for a new trial, upon the ground of newly discovered evidence was properly denied. The newly discovered evidence was, according to the affidavits, cumulative, and in such cases, it is well settled, a new trial should not for such cause be granted.

Upon the whole case as presented, we are of opinion, the judgment of the court below and the order denying the motion for a new trial should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9538. Department Two.—September 25, 1885.]

ALFONZO GINOCCHIO, RESPONDENT, v. THE AMADOR CANAL AND MINING COMPANY, APPELLANT, AND SAMUEL W. BRIGHT AND LEOPOLD NEWMAN, INTERVENORS.

ASSIGNMENT—THING IN ACTION—SECURITY—POWER OF ASSIGNEE TO SUE.—If a contract is transferred by an assignment absolute in form, though as security only for a debt less in amount than the sum due or to become due upon the instrument assigned, the assignee is not limited in an action upon the contract to recover the sum due him from the assignor, but may recover the whole amount due thereon, being in turn responsible to his assignor for any excess.

ID.—WATER RIGHT.—The defendant and the plaintiff's assignor, a mining company, entered into a contract under which the former agreed to furnish water to the latter for the purpose of working a quartz

mill and mine, through a ditch to be constructed by the mining company. The latter was to be repaid the expense of building the ditch in water, and in case it abandoned the working of the mill and mine before the payment was complete, then it was to be paid out of the net proceeds of water run through and sold from the ditch. The company completed the ditch and delivered it to the defendant, but before it was repaid the expense of building, abandoned its mining operations. *Held*, that the ditch and water supply were not appurtenant to the mill or mine, and that the rights of the mining company under the contract might be assigned independently of the mill and mining property.

APPEAL from a judgment of the Superior Court of Amador County, and from an order refusing a new trial.

The facts are stated in the opinion.

James Wheeler, and *Eagon & Armstrong*, for Appellant.

James T. Farley, and *A. C. Adams*, for Respondent.

SEARLS, C. — This is an action brought by Alfonso Ginocchio, as assignee, against the Amador Canal and Mining Company, upon an instrument in writing, to recover the sum of \$5,942.72, with interest, in which action Bright and Newman intervened.

The instrument in suit was an agreement dated December 31, 1878, between the Amador Canal and Mining Company, a corporation, and the Moore Mining Company, a mining copartnership, by the terms of which the Amador Company agreed to furnish water to the mining company for five years, to run a quartz mill, at a fixed price per inch, to be supplied through a ditch to be constructed by the mining company. The latter was to be paid the expense of building the ditch by the Amador Company in water, and in case working the quartz mine was abandoned before such payment was received, the Amador Company was to pay the expense of building the ditch in cash, from the net proceeds of water run through and sold from such ditch. The ditch was constructed at an expense of \$7,713.65, and delivered to the Amador Company on or about February 1, 1879.

About March 25, 1879, the members of the mining company organized a corporation under the name of the Moore Mining Company, to which they delivered possession of their mill and quartz mine, and verbally assigned their interest in the water contract.

The interest of the mining company in the mines seems to have been only that of the holder of a bond for the conveyance thereof. The corporation worked the mine and received water on the contract of the mining company until September, 1879, when they abandoned operations, and on the 2d day of September, 1879, assigned the water contract to the plaintiff herein, and at the same date the mining copartnership, by C. J. Garland, one of its members, assigned said water contract to plaintiff, of all of which the Amador Company had notice.

On the 3d day of May, 1881, all of the copartners of the Moore Mining Company executed a further assignment of the water contract to plaintiff, and ratified and confirmed the act of C. J. Garland in the assignment of September 2, 1879.

Defendant caused fifty dollars to be paid to plaintiff on account of the contract, February 28, 1881.

It is conceded that defendant had received in net profits from the sale of water from the ditch in question a sum sufficient to satisfy the balance due on the contract.

The intervenors, Bright and Newman, claimed under a mechanic's lien taken upon the mill and mine for work performed for the corporation, and hold a sheriff's deed, under which they claimed the water contract or right and ditch passed to them as appurtenant to the mill and mine.

The court rendered judgment in favor of plaintiff as against defendant and the intervenors; the latter have not appealed.

The first point made by appellant is that the fifth finding is not sustained by the evidence, and is against the evidence. This is the finding in which the court finds a verbal assignment of the water contract. In our view of the case, it is quite immaterial whether the contract was or was not assigned by the mining company to the corporation. Both the mining company and the corporation assigned to the plaintiff, and if the rights under the contract did not vest in him under one of these assignments, they must have done so under the other.

In this connection it is proper to say the third point made by appellant that the assignment by the corporation to plaintiff was as security only cannot be sustained.

By the order of the board of directors, the president of the corporation was authorized to sell, assign, and transfer any and

all property for the benefit of the creditors, to the best possible advantage, or as he may see fit. He assigned the contract absolutely, and the witness Voorhies declares it was not done by way of security, but in payment of a claim of plaintiff against the corporation, amounting to \$3,400. The assignment was in form sufficient to transfer title in the chose in action to plaintiff, and if there is in fact any contingent interest remaining in the corporation it is the province of the latter, and not of defendant, to assert it.

If a chose in action is transferred by an assignment absolute in form, though as security only, for a debt less in amount than the sum due, or to become due, upon the instrument assigned, the assignee is not limited in an action upon such chose in action, to recover only the sum due him from the assignor, but may recover the whole amount due thereon, being in turn responsible to his assignor for any excess.

The second point of appellant is not sustained by the evidence.

It certainly does appear that on the 1st of September, 1879, or thereabouts, the corporation quit and abandoned work on the mine. Subsequently thereto Garland, its manager, did some work on his own account and at his own risk, and by consent of the company, upon the mine, but under the testimony, he could not have held the corporation responsible for the expense thereof, and it was not in any proper sense work of the corporation.

The contract upon which the action was brought, both by its terms and its character, was assignable. The ditch which was to be constructed by the mining company was to be paid for by the defendant. It was, according to the pleadings, delivered to the defendant when completed, and possession thereof has ever since been retained by such defendant. The water run through this ditch to the quartz mill was to belong to defendant, after being used to run the machinery. In case work was abandoned at the mine, defendant was to pay for the construction of the ditch out of the proceeds of water sold therefrom.

These facts taken together seem to indicate that defendant owned the ditch, and that neither the structure nor the water to be run through it bore any such relation to the mill or mine as to make them or either of them an appurtenant thereto.

“A thing to be appurtenant to another must be of a different

and congruous nature, such as an easement or servitude, or some collateral incident belonging to and for the benefit of the land." (Story, J. 1 Sum. 21; Civ. Code, § 662.)

Here the ditch and water which it conveyed were not the property of the owners of the mill or mine.

The water supply of a mill will ordinarily pass with a conveyance of the mill, but in order to do so it must belong to the mill, must be the property of the owner thereof, and not of another.

We may add that the question as to whether the water supply did or did not pass to the intervenors, as an appurtenant of the mill, is one that cannot affect the defendant in the manner claimed by it.

The court below found that it *did not pass*, and rendered judgment against the intervenors, from which judgment they have not appealed. They are concluded by the action of the court from asserting any claim to the water under the contract in question.

The motion for a nonsuit was properly denied.

The additional questions of law presented by the record cannot, we think, affect the result, and the judgment and order should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are affirmed.

Hearing in Bank denied.

[No. 9924. Department Two.—September 25, 1885.]

B. F. REYNOLDS, RESPONDENT, v. WILLIAM SNOW,
APPELLANT.

ELECTION—CONTEST—ILLEGAL BALLOT.—The court below rejected a ballot which did not conform in length and other minor respects to section 1191 of the Political Code. The ballot was only about eight inches and a half in length. *Held*, that the ballot was properly rejected.

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ID.—ERASURE.—In certain ballots the voters had erased with lead pencil marks the name of the contestant and also the name of the office to be voted for, leaving simply the number indicating its order on the ballot, and opposite this number and erasure had written the name of the defendant. *Held*, that these ballots were properly counted for the defendant.

ID.—APPEAL—CONFLICT OF EVIDENCE.—The rule which restrains an appellate court from interfering with a finding of the court below where there is a conflict in the evidence, does not apply when the evidence consists entirely of ballots, photographic copies of which are before the court on appeal.

APPEAL from a judgment of the Superior Court of the county of Stanislaus.

The facts are stated in the opinion.

Schell & Bond, for Appellant.

Wright & Hazen, for Respondent.

FOOTE, C. — A contest for the office of supervisor of district No. 1 of Stanislaus County.

The bill of exceptions in the transcript should be considered by this court; the objections made to it by the respondent are not well taken. It appears by the official returns of the various election boards of the district as canvassed by the board of supervisors of the county, that the appellant, William Snow, received 324 and the respondent, B. F. Reynolds, 323 votes. To the former the board awarded the certificate of election and the office in dispute. The latter contested his right thereto and prevailed in the contest. From that judgment Snow appealed.

The court upon a recount of the ballots, discovered that the contestant's Exhibit No. 8 was one having the name of Wm. Snow printed on it, and that of the office for which he was a candidate, but the paper on which it was printed was when voted only about eight inches and a half in length, and did not in that and some other minor respects conform to section 1191 of the Political Code, and ought not to be counted for Snow as it had been. This conclusion of the court was correct.

That tribunal substantially found also that an election board had counted for Snow two ballots called plaintiff's Exhibits 2 and 3; that on them and in the same line were printed the following words and figures, viz.: "23. Supervisor, District No. 1, B. F. Reynolds"; that the words "supervisor, District No. 1,

B. F. Reynolds," had been distinctly and completely erased by several lead pencil marks being drawn completely through said words and each of them, and that upon one of said ballots had been written the words "Wm. Snow," and upon the other the word "Snow," and that these words were written opposite said figures 23, line and erasure.

That the words erased were still discernible and distinguishable, and that the voter intended by the erasure to strike from the ballots, and each of them, the name of the office of supervisor of said county, in and for said district, and that no such office remained designated upon said ballots, and that neither the board of election nor the court could ascertain that the voters intended to vote for said "Snow," and "William Snow," respectively, for said office, and that it was not the intention of said voters to vote for any person for said office.

To this finding upon a thorough inspection of those ballots we cannot agree.

In a case where there was a conflict in the evidence in the sense that witnesses in the presence of the court had sworn contrary to each other as to facts, we should not feel warranted in entering our dissent, but where as in this case, the ballots themselves were on that point the only evidence before the court, and as photographic copies of them are before us, it is clear that there was no such conflict in the evidence as should prevent us from exercising a judgment contrary to that of the learned judge below.

The reason why a court of appeal declines ordinarily to interfere upon a conflict of evidence, is because the trial court has an advantage over the former in that it can both hear the witness and observe his deportment when before it and delivering his testimony.

In the present instance the reason fails, and with it the rule of action.

The persons writing "Snow" and "Wm. Snow," on Exhibits 2 and 3, intended to vote for William Snow for supervisor of District No. 1, Stanislaus County, and the board of election were right when they counted those ballots for him for said office.

It became plain from an inspection of another of the ballots by the court, that the board of election had erroneously counted

for Reynolds one ballot which was on its face unmistakably cast for Snow, and thereupon it was properly counted for Snow.

The action of that tribunal in taking from Snow a vote upon evidence showing that Jarvis Whitehead not being a legal voter had voted for him in Supervisor District No. 1, Stanislaus County, will not be reviewed, as the evidence was conflicting in the proper sense of that term.

The court found further that B. F. Reynolds received for the office in dispute 322 and William Snow 321 legal votes.

From the foregoing it appears that the finding should have been that B. F. Reynolds received 322 and William Snow 323 votes for the same.

The judgment should be reversed and cause remanded.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is reversed and cause remanded.

Hearing in Bank denied.

[No. 9748. Department One.—September 26, 1885.]

J. S. CAMERON, EXECUTOR, ETC., RESPONDENT, v. JOHN H. CARROLL, APPELLANT.

JUDGMENT—SETTING ASIDE—ABSENCE OF ATTORNEY—DISCRETION.—It is not an abuse of discretion for a trial court to set aside a judgment by default rendered in the absence of the plaintiff and his attorney, when the latter resided at a considerable distance from the place of trial, and had reason to believe that the case would not be tried at the time it was taken up.

APPEAL from an order of the Superior Court of Sacramento County setting aside a judgment by default.

The facts are stated in the opinion.

Robert T. Devlin, for Appellant.

Chipman & Garter, W. H. Beatty, and S. C. Denson, for Respondent.

BELCHER, C. C.—This is an appeal from an order setting aside a judgment rendered in the absence of the plaintiff and his attorneys. The motion to set aside the judgment was made under section 473 of the Code of Civil Procedure, and was granted on condition that the plaintiff pay to the defendant the sum of \$100 within ten days. The defendant excepted. The only question is, did the court abuse its discretion in making the order?

After reading the affidavits presented we cannot say that there was any abuse of discretion. The case was at Sacramento, and the plaintiff's attorneys resided at Red Bluff and supposed, and we think not without reason, that the case would not be tried at the time it was taken up. (*McKinley v. Tuttle*, 34 Cal. 235.)

"The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application." (*Watson v. S. F. & H. B. R. R. Co.* 41 Cal. 20.)

The order should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the order is affirmed.

Hearing in bank denied.

[No. 11027. Department One.—September 26, 1885.]

RECLAMATION DISTRICT NO. 3, APPELLANT, v. E. R. PARVIN ET AL., RESPONDENTS.

RECLAMATION OF SWAMP LANDS—DELINQUENT ASSESSMENT—PLAINTIFF IN ACTION TO RECOVER.—A reclamation district, as the real party in interest, may sue in its own name to recover delinquent assessments for the reclamation of swamp lands.

ID.—VIEWING AND ASSESSING BY COMMISSIONERS.—Section 33 of the Act of March 28, 1868, requiring the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited thereby a tax." etc., means that the three commissioners, acting jointly or together, shall view and assess, etc.

APPEAL from a judgment of the Superior Court of Sacramento County.

The facts are stated in the opinion.

H. L. Buckler, and *G. W. Gordon*, for Appellant.

McKune & George, for Respondents.

BELCHER, C. C.—This is an action to recover a delinquent assessment upon certain lands situated in the reclamation district which is named as plaintiff. The defendants demurred to the complaint upon the ground that the action should have been brought in the name of the people of the State of California as plaintiff, and not in the name of the district, and upon the further ground that the complaint was ambiguous, unintelligible, and uncertain.

The court sustained the demurrer, and the plaintiff declining to amend, judgment was entered in favor of the defendants.

From this judgment the appeal is taken.

1. The plaintiff was organized as a reclamation district under the provisions of the "act to provide for the management and sale of the lands belonging to the State," approved March 28, 1868. Under this act delinquent assessments were to be collected "in the same manner as is provided by law for the collection of State and county taxes" (§ 35); and it has been held that actions to collect such assessments were properly brought in the name of the people as plaintiff. (*People v. Hagar*, 52 Cal. 171; *People v. Haggin*, 57 Cal. 579.) It has also been held, since the decision upon the demurrer in this case, that actions to collect such assessments may be maintained when brought in the name of the reclamation district as plaintiff, the district being the real party in interest. (*Reclamation District No. 108 v. Hagar*, 66 Cal. 54.)

That decision is decisive of the point now raised here.

2. The point that the complaint is ambiguous, unintelligible, and uncertain is not well taken. The statute (§ 33) required the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited thereby a tax," etc.

The word "jointly" qualifies the words "view" and "assess,"

but it means only that the three commissioners, acting jointly or together, shall view and assess, etc.

The complaint alleges that the commissioners jointly viewed the lands in the district, and jointly assessed upon each and every acre to be reclaimed or benefited thereby the amount of the assessment in proportion to the whole expense, and to the benefits to result from the works of reclamation, and that they made a list showing the amount of the charges assessed against each tract of land in the district, with other necessary particulars.

This, we think, was sufficient.

It results that the judgment should be reversed and the cause remanded, with directions to the court below to overrule the demurrer.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer.

Hearing in bank denied.

[No. 9609. Department One.—September 26, 1885.]

D. O'BRIEN, APPELLANT, v. THE COUNTY OF COLUSA,
RESPONDENT.

LICENSE TAX—VOLUNTARY PAYMENT OF.—Money voluntarily paid in satisfaction of an illegal license tax cannot be recovered back.

ID.—POWER OF SUPERVISORS.—Section 3804 of the Political Code does not authorize the board of supervisors of a county to order a license tax erroneously or illegally collected to be refunded by the county treasurer.

APPEAL from a judgment of the Superior Court of Colusa County.

The action was brought to recover certain amounts paid by the plaintiff and his assignors in satisfaction of license taxes levied and collected by the defendant subsequent to the adoption of the present Constitution, under the provisions of section 3356 to 3387 of the Political Code. The sections referred to were,

subsequent to the collection of the taxes, declared unconstitutional by the Supreme Court in *People v. Martin*, 60 Cal. 153. The further facts are stated in the opinion.

Hart & White, for Appellant.

Section 3804 of the Political Code, providing that the board of supervisors of a county "may" order the refunding of a tax illegally collected, should be construed as mandatory. (*Supervisors v. U. S.* 4 Wall. 446; *People v. Supervisors*, 68 N. Y. 119; *Rez. v. Barlow*, 2 Salk. 609; *Malcolm v. Rogers*, 5 Cowen, 188; 15 Am. Dec. 464; *Ex parte Simonton*, 9 Port. 390; 33 Am. Dec. 320; *Newburgh Turnpike Co. v. Miller*, 5 Johns. Ch. 101; 9 Am. Dec. 274; *Estate of Ballentine*, 45 Cal. 699; *People v. Supervisors*, 51 N. Y. 401.)

Edward Swinford, and *T. J. Hart*, for Respondent.

The license taxes having been voluntarily paid cannot be recovered back. (*Brumagin v. Tillinghast*, 18 Cal. 271; *Bucknall v. Story*, 46 Cal. 596; *Bank of Woodland v. Webber*, 52 Cal. 73; *Wills v. Austin*, 53 Cal. 152; *Town of Ligonier v. Ackerman*, 46 Ind. 552; *Town of Brazil v. Kress*, 55 Ind. 14; *Emery v. City of Lowell*, 127 Mass. 138; *Cahaba v. Burnett*, 34 Ala. 400; *Detroit v. Martin*, 34 Mich. 170; *Rogers v. Greenbush*, 58 Me. 390; *Mayor of Baltimore v. Lefferman*, 4 Gill, 425; 45 Am. Dec. 145; *Railroad Co. v. Commissioners*, 98 U. S. 544.) License fees are not property taxes within the meaning of section 3804 of the Political Code. (*Loomis v. Los Angeles*, 59 Cal. 456.)

FOOTE, C.—This is an action against Colusa County, to recover moneys alleged to have been "illegally and erroneously" collected for licenses, paid by divers persons who before suit assigned their claims to the plaintiff.

The several sums of money sued for, according to the allegations of the complaint, were *voluntarily* paid, and not for or on account of any *property taxes* assessed.

Section 3804 of the Political Code, which the plaintiff relied on to support his contention, does not apply to an action of this

kind. And no rule of law authorizes him to recover. (*Harper v. Rowe*, 53 Cal. 234; *Loomis v. County of Los Angeles*, 59 Cal. 456.)

The demurrer to the complaint was properly sustained and the judgment should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment is affirmed.

Hearing in bank denied.

[No. 9862. Department One.—September 26, 1885.]

THE FRESNO ENTERPRISE COMPANY, APPELLANT, v.
WILLIAM H. ALLEN ET AL., RESPONDENTS.

CORPORATION—SECRETARY—BOND—LIABILITY ON.—In June, 1881, the defendant Allen was elected secretary of the corporation plaintiff for the term of one year, and until his successor should be elected and qualify. He thereupon executed to the plaintiff a bond with sureties in the penal sum of \$10,000, to secure the safe-keeping and payment to it of all moneys that might come into his possession as secretary, and not paid out in the due course of business. The by-laws of the corporation authorized the board of directors to remove at pleasure all officers, and fix their terms of office. In June, 1882, Allen was re-elected, and the action was brought on the bond against him and his sureties to recover moneys alleged to have been misappropriated by him after his re-election. *Held*, that the action could not be maintained.

APPEAL from a judgment of the Superior Court of Fresno County.

The facts are stated in the opinion of the court.

James Grant, and *Wallace & Hastings*, for Appellant.

The defendants were liable on the bond for a default of the principal occurring subsequent to his re-appointment as secretary. (*Placer County v. Dickinson*, 45 Cal. 12; *Anderson v. Longdin*, 1 Wheat. 85; *Amherst Bank v. Root*, 2 Met. 522; *Dedham Bank v. Chickering*, 3 Pick. 335; *U. S. v. Truesdale*, 1 Bond, 78; *Jacobs v. Hill*, 2 Leigh, 393; *Chairman of Common*

Schools v. Daniel, 6 Jones (N. C.) 444; *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Supervisors of Omro v. Kaime*, 39 Wis. 468.)

Garber, Thornton & Bishop, for Respondents.

McKINSTRY, J. — The action is on a bond, executed by the defendants, and which is in words and figures as follows:—

“Know all men by these presents, that we, William H. Allen, as principal, and James E. Bowe and John Haley, as sureties, are held and firmly bound to the Fresno Enterprise Company in the penal sum of \$10,000, to the payment of which we bind ourselves and each of us.

“Given under our hands and seals the 1st day of September, 1881.

“The condition of this obligation is such, that, whereas, William H. Allen is secretary of the Fresno Enterprise Company, and as such, has, or may have, the custody of the moneys of said corporation; now if said William H. Allen shall duly preserve and keep all such funds as may come under his control or into his possession, and pay over to said company all such funds as he may not pay out in the due and lawful course of business, then this obligation to be void; otherwise to remain in full force.

[SEAL.] (Signed):

“WM. H. ALLEN,

[SEAL.]

“J. E. BOWE,

[SEAL.]

“JOHN HALEY.”

The complaint is:—

“*First*—On the 4th day of June, A. D. 1881, William H. Allen was appointed by the board of directors of said Fresno Enterprise Company, secretary of said corporation, to hold his office for one year and until his successor should be elected and qualified; that by the by-laws of said company the board of directors were empowered to appoint and remove at pleasure all officers, agents, and employees of the corporation, fix their tenure of office, prescribe their duties, fix their compensation, and require security for faithful service.

“*Second*—That at the annual election of officers in June, 1882, no successor to said Allen was elected, but he was con-

tinued as secretary until the further order of the board. A successor was elected and qualified in June, 1883.

“Third—That after said Allen’s election, and about the 1st of September, 1881, said Allen, as principal, and said Bowe and Haley, as his sureties, executed and delivered to said company their joint and several bond or writing obligatory for the payment to said corporation of the sum of \$10,000; and said bond had a condition thereunder written, which recited: ‘That whereas said Allen is secretary of the Fresno Enterprise Company, and as such, has or may have the custody of the moneys of said corporation, now, if said Allen shall duly preserve and keep all such funds as may come under his control or into his possession, and pay over to said company all such funds as he may not pay out in the due and lawful course of business, this obligation to be void; otherwise, to remain in full force.’

“And for breach of the condition of said writing obligatory, the plaintiff says that on the 25th day of December, 1882, and on divers days and times between that day and the 1st of May, 1883, the said Allen received and had in his possession of the moneys of said company the sum of \$4,500.60, which he has neglected and refused to account for and pay over to the treasurer of said company, the proper officer to receive the same, and upon demand made, neglects and refuses to account for or pay over the same to the proper officers of said company; that said Allen as secretary was the custodian of said bond, and has refused to deliver the same to his successor in office, and has lost or destroyed the same.

“The plaintiff tenders to the defendant such indemnity for the loss of said bond as this court may require, and annexes hereto a substantial copy thereof, marked Exhibit ‘A.’

“Fourth—By reason of the premises, the said defendants, each of them, have become liable, and are bound to pay to said plaintiff the said sum of \$4,500.60, with interest from the 1st of May, 1883, for which sum, with interest and costs, the plaintiff asks judgment.”

The court below sustained a demurrer to the complaint, on the ground that the same shows the defendants are not liable on the bond for any part of the moneys mentioned in the complaint, because it appears from said complaint that said moneys were

not received, or in the possession of said William H. Allen "prior to the 25th day of December, 1882."

Official bonds are to be construed with reference to the *statutes* bearing on them, and the liability of the obligors on such bonds has been considered very fully in several cases in this court. notably in *Hubert v. Mendheim*, 64 Cal. 213. But as was said in that case with reference to bonds given to individuals and private corporations, "such matters are the subject of private contract, by which the parties may bind themselves in any manner or to any extent, not violative of public policy or positive statute." These private contracts are to be interpreted, like other private contracts, with reference to their language and the circumstances under which they were entered into.

On the 4th day of June, 1881, the defendant William H. Allen was appointed by the board of directors of the corporation, plaintiff, secretary, "to hold his office for one year and until his successor should be elected and qualified," but subject to and in view of a by-law of the company, which provided that the board of directors should have power "to remove at pleasure all officers, agents," etc.

The obligors knew when they executed the bond that William H. Allen would continue as secretary until June 4, 1882, unless he was sooner removed by the board of directors. They knew also that he might continue to serve after the 4th of June, 1882, and until his successor should be "elected and qualified." It is difficult to give any meaning to the word "qualified," in the connection in which it is used. It does not appear that by the charter or by-laws the secretary was obliged to take an *oath* (passing the circumstance that such an oath if required simply by a by-law would be extrajudicial), or that the charter or by-laws required the secretary to give bond. Yet a particular secretary could be required at any time to give bond as a condition to his retention of the office, and if the defendants voluntarily executed the instrument sued on, it was executed and delivered for a sufficient consideration. By its terms they were bound for the safe-keeping and proper disposition of the company's money which came into William H. Allen's hands. During what period? Up to the 4th of June, 1882 (unless he should be removed), and until his successor should be elected or

appointed. It is true the principal obligor did not have a vested right in the office for a definite period. But it is clear the contract was made with reference to the term to expire on the then next 4th of June, or when the successor should be named. The term was for a definite time—not rendered entirely indefinite by the circumstance that the directors expressly retained the right to remove in the meantime; a right to dismiss for sufficient cause would have been implied, had it not been expressly reserved.

There is no averment in the complaint that by the by-laws or charter the secretary's term of office is one year, or one year and until, etc., but only that the defendant was so appointed. His successor might be appointed to hold at the pleasure of the appointing power simply. If another person had been so appointed at the expiration of the year, there would remain no doubt that on such appointment being made, and the office turned over to the appointee, the liability of the obligors would have ceased as to time. William H. Allen could be and was appointed his own successor. In June, 1882, he "was continued as secretary until the further order of the board." The complaint avers that no successor was appointed, but the averment goes for naught if the order of the board was such appointment. The bond was executed with reference to the possible continuance of the defendant as secretary to June 4, 1882, and for reasonable time beyond, within which a successor might be nominated. It is claimed that the order of the board "continuing Wm. H. Allen as secretary" had no greater effect than their silence would have had, and if they had not acted he would have continued as secretary until his successor was appointed or he was removed. It may be doubted whether the plaintiff could render the defendants liable on the bond for any period by merely omitting to name a successor. But here his term having expired, the directors re-appointed Allen.

The bond in suit does not provide (as does the bond in some of the cases cited) that the obligors shall be responsible for malfeasance of William H. Allen "during the time he shall continue secretary," or "while he shall continue to act as secretary," or other like words. The recital is: "Whereas, William H. Allen is secretary," etc. Surely the obligors (sureties) did

not intend to bind themselves to answer for all defalcations of their principal, which might happen during his natural life,, in case he should be re-appointed and act as secretary for the rest of his life.

Is that the meaning of their contract fairly interpreted? They were not compelled to anticipate that some other person than Allen would be appointed at the expiration of Allen's term.

Counsel for appellant concede that if, by the charter of the company or laws of the State, the office of Allen was limited to one year, the defendants would not be liable beyond the year, and that when the bond is general, but the period of the office limited by the by-laws of the company, the sureties are not liable for a default after the expiration of the limited time. (*Welch v. Seymour*, 28 Conn. 387; *Chelmsford v. Demarest*, 7 Gray, 1; *South Carolina v. Johnson*, 1 McCord, 41.) But it is contended that when "the tenure of office is until his successor is elected or qualified, or accepts—which may be a sufficient qualification—then the sureties are bound for a default occurring at any time before the principal is succeeded, or in the words of this court in 45 California, when (while) he is yet 'in office,'"

The case in 45 California, referred to by counsel (*Placer County v. Dickerson*, 45 Cal. 13), was an action on a county treasurer's bond. Dickerson was elected treasurer, to hold from the first Monday of March, 1866, to the 2d day of March, 1868. He continued in office until the 3d day of March, 1868, when he turned over the books, vouchers, moneys, etc., to his successor, who had demanded them the previous day. There is no pretense that his successor began to act as such, or had assumed the office on the 3d of March, when the defalcation occurred. It occurred while Dickerson assumed to act as treasurer under his election prior to the commencement of his term. The facts in that case were different from those in the present.

In this case William H. Allen was re-appointed—named as successor. The argument always returns to the question, "what does the contract mean?" It was the apparent intention of both parties that at the expiration of his year (if he was not sooner removed), some one should be named to succeed Allen as secretary, upon whose appointment the liability of the obligors

should cease, so that they should not be responsible for subsequent acts of the secretary. The plaintiff performed its duty in the premises by appointing Allen as his own successor. When he began to act under the re-appointment the liability of defendants on the bond ceased. As we have seen, it does not appear that the charter or any by-law fixed the term of secretary at one year or any definite term. The directors had power to appoint a secretary to hold until the further order of the board.

The liability of the defendant William H. Allen on *the bond*, is no greater than, nor is it different from, that of the other defendants. Of course he is liable in a direct action for moneys of the plaintiff he has misappropriated. But the liability of each of the defendants, who executed the specific contract, is the same.

A principal in a bond is no further bound than his sureties. (*Bigelow v. Bridge*, 8 Mass. 274.) Appellant's counsel suggests, "suppose a principal forged the name of a surety. The surety would not be liable but the principal would be." In that case the principal would be liable because he executed the bond; the alleged surety would not be liable because he did not execute it.

Judgment affirmed.

Ross, J., and McKee, J., concurred.

[No. 9678. In Bank.—September 26, 1885.]

IN THE MATTER OF THE DISBARMENT OF R. E.
HOUGHTON.

DISBARMENT OF ATTORNEY—EVIDENCE.—The proceeding was brought to procure the disbarment of an attorney on the ground that pending a motion before the Supreme Court he had made certain false statements for the purpose of misleading and deceiving the justices. On a review of the evidence, *held*, that the application should be denied.

ID.—GUILT OF ATTORNEY MUST BE CLEARLY ESTABLISHED.—An attorney should not be suspended or disbarred from the practice of his profession unless the court is clearly satisfied of his guilt.

APPLICATION for the disbarment of an attorney and counselor of the Supreme Court. The facts are stated in the opinion of the court.

W. W. Foote, for Petitioner.

McAllister & Bergin, E. G. Stetson, and Warren Olney, for Respondent.

MCKINSTRY, J.—On the 7th day of January, 1884, this court made an order “in the matter of the estate of Allen E. Rose, deceased,” wherein (after reciting that William B. Rose, as guardian of the estate of Louis Allen Rose, aged seven years, Lydia Rose, aged three years, and Ethel Rose, aged two years, only heirs of Allen E. Rose, deceased, and as a creditor of the estate of said Rose, had presented a petition for leave to prove a bill of exceptions to be used in this court on an appeal taken by him as such guardian and creditor, from an order made in the Superior Court of Kern County, allowing the account of H. Hirshfield, administrator of the estate of said Allen E. Rose, deceased, and alleging in the said petition that the Hon. B. Brundage, judge of the said Superior Court for Kern County, refuses to allow said bill of exceptions), orders: That said petition be referred to the Hon. W. W. Cross, judge of the Superior Court of Tulare County, and that said petitioner appear before said W. W. Cross and prove his bill of exceptions in accordance with the facts, in case said bill has not been properly settled, and when so proven, the same to be certified as correct by the Hon. W. W. Cross, and filed in the Superior Court of Kern County. The order further requires Judge Cross to give a certain notice of the time, etc., when the bill was to be settled to Judge Brundage, the attorney appointed by Judge Brundage to represent minor heirs and the attorney of Rose.

The hearing of the motion to settle the bill of exceptions was set by Hon. W. W. Cross for the 26th day of January, 1884, and notice thereof served on the several parties named as required by the order of the Supreme Court. On the 21st day of said January, J. W. Freeman, Esq., attorney for the minor heirs, R. E. Arick, Esq., attorney for the administrator, and Stetson & Houghton (R. E. Houghton) attorneys for petitioner, entered into and signed a *stipulation* in words and figures following:—

“In the matter of the settlement of a bill of exceptions:—

“Estate of Allen E. Rose, deceased.

“The hearing in the said matter having been heretofore set by Judge W. W. Cross, for Saturday, January 26, 1884, at 10

o'clock A. M., at Visalia, Cal., we consent that the hearing may be continued to Saturday, the 2d day of February, 1884, at 10 o'clock A. M., at the same place."

On the 29th of January, 1884, H. Hirshfield, administrator of the estate of Allen E. Rose, deceased, by Flournoy, Mhoon & Flournoy as his attorneys, moved this court (Department Two), upon affidavit of said Hirshfield, that the order of the 7th of January, referring the petition of W. B. Rose as guardian, etc., to the Hon. W. W. Cross, and authorizing him to settle the proposed bill of exceptions, be vacated and set aside; which said motion was continued for hearing until the 1st day of February, 1884. On the day and year last mentioned R. E. Houghton, Esq., appeared in opposition to said motion, and J. B. Mhoon, Esq., in support thereof, and the said R. E. Houghton, Esq., then and there, before Department Two aforesaid, read in opposition to the motion his affidavit (previously filed) duly subscribed and sworn to by him, a portion whereof is as follows:—

"In the Supreme Court of the State of California:—

"In the matter of the estate of Allen E. Rose, deceased.

"STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, } ss.

"R. E. Houghton being duly sworn says that he is a member of the firm of Stetson & Houghton, attorneys for the petitioner herein. That Judge W. W. Cross, to whom this court referred the petition of W. B. Rose to prove a bill of exceptions proposed by him, to be used by him on an appeal heretofore taken in this case from an order of the Superior Court of Kern County, allowing an annual account of the administration of said estate, did by order fix the 26th day of January, 1884, at 10 o'clock A. M., as the day and hour he would settle said bill of exceptions. R. E. Arick, Esq., who is the attorney of record in this case for H. Hirshfield, administrator of said estate, J. W. Freeman, appointed by the court to represent the minor heirs of said estate, and Stetson & Houghton, attorneys for petitioner herein, *have stipulated* that said bill of exceptions *shall be settled by the Hon. W. W. Cross* on February 2, 1884, at 10 o'clock A. M., at Visalia."

On the 1st day of February, 1884, when said affidavit was read, the motion to vacate and set aside was argued orally by

J. B. Mhoon, Esq., and R. E. Houghton, Esq. The testimony taken before the referee appointed in the present proceeding and returned to this court, shows that on the hearing of the said motion to vacate, when the said R. E. Houghton read that portion of his affidavit above recited, it was suggested to him that the stipulation was or might have been a stipulation merely to continue the hearing before Judge Cross; to which he responded, "no, the stipulation is as stated in the affidavit." Objection was made to the testimony last mentioned. We think, however, the objection is not well taken. The evidence tended to show that the statement in the affidavit was not inserted inadvertently, perhaps also that the affiant understood the same to mean that the stipulation was more than an agreement to postpone the settlement of the bill of exceptions. The testimony returned also shows that Department Two, on the said 1st of February, denied the motion to vacate the former order. This was proved by a witness who swore to the fact. His testimony was objected to as "irrelevant and immaterial." It was relevant and material and no objection was made that it was *incompetent*. Moreover the minutes of the court show that Department Two did deny the motion on the day named.

The present proceeding is an application that the name of the respondent R. E. Houghton, Esq., be stricken from the roll of attorneys and counselors of this court, and that he be precluded from practicing as such attorney and counselor in all the courts of this State. (Code Civ. Proc. § 299.) The accusation is that in the affidavit filed in this court, and so as aforesaid used in and before Department Two, the respondent for the purpose of misleading and deceiving the justices composing said department, falsely swore that Stetson & Houghton, R. E. Arick, and J. W. Freeman, Esqrs., had, as representatives of the several parties mentioned in said proceeding for the settlement of the bill of exceptions, stipulated that said bill of exceptions should be settled on a certain day before the Hon. W. W. Cross, whereas in truth and in fact the only stipulation in said proceeding actually made by the persons named was and is the stipulation hereinbefore set forth. And the accusation further specifies that on the occasion when said affidavit was read before Department Two, respondent (for the purpose of deceiving and misleading

the court), in response to a suggestion that the stipulation referred to was only a stipulation to continue the hearing of the settlement, stated and declared that the same was not for a continuance merely, but was as stated in said affidavit. Respondent did not produce the stipulation before Department Two, but there and then averred that the same was on file with Judge Cross at Visalia.

If there had been any question of the personal qualifications of the Hon. W. W. Cross to settle the bill of exceptions, such objection would have been waived by the stipulation to continue the hearing before him. No such objection was made at any stage of the proceedings; on the contrary, there is no dispute but he was eminently a proper person to whom to refer the matter. So if no notice of the hearing before Judge Cross on the 26th of January had been served on any of the parties, or the notice was for any reason defective, the stipulation of the 21st of January would have precluded a party to it from objecting to the sufficiency of the notice. But if the stipulation instead of being worded, as in fact it was worded, had been in exact terms "that said bill of exceptions shall be settled by the Hon. W. W. Cross on February 2, 1884," no greater effect could be given it. Notwithstanding such stipulation, Department Two would have vacated the order referring the matter of the settlement to the Hon. W. W. Cross if it appeared the matter ought not to have been referred to any person. No stipulation could give Judge Cross *jurisdiction*. His jurisdiction was derived exclusively from the order of the Supreme Court, and he was subject to deprivation of the jurisdiction by the Supreme Court, at any time before he completed his duty under the order.

As a stipulation "that the bill of exceptions should be settled by the Hon. W. W. Cross" would have given Judge Cross no *power* to settle the bill, as against an order of this court setting aside the order appointing him for that purpose (in this respect having no more effect than the stipulation actually executed), and as the opportunity and power to make the stipulation itself was derived from the order of this court, a stipulation so purporting to submit the settlement to Judge Cross would have been referred to the order, and held to be a submission in accordance with the order of the Supreme Court. Such a

stipulation, therefore, would not have been an answer to the motion to vacate the order authorizing Cross to settle the bill of exceptions. A stipulation such as the affidavit alleges was made could have no greater effect or influence on Department Two of this court—so far as the disposition of the motion to vacate the former order is concerned—than the stipulation actually entered into by the parties.

The application to vacate the former order was based on the ground that the order had been inadvertently entered, or rather that the order had been entered without knowledge on the part of the court of certain facts—as that the petitioner had been removed from his office of guardian, etc. Whether the statement in the affidavit, as to the contents of the stipulation, induced Department Two to deny the motion for the vacation of the order appointing Judge Cross to settle the bill, is a matter resting in the memory of the justices who composed the department. We are assured it had no such influence, and are convinced it ought not to have had.

But this does not relieve the respondent of the charge of moral delinquency, if the affidavit was wilfully false, in that it was deliberately intended to produce a false impression. The question is not whether Department Two was actually misled by the statement in the affidavit; rather, is the statement false; made for the purpose of deceiving the court? Although it be conceded that, in its legal effect, and in so far as it could affect any point then and there to be decided by Department Two, the statement as to the stipulation contained in the affidavit was the same as if the exact language of the stipulation had been recited; yet a statement that the parties had agreed the bill should be settled by the Hon. W. W. Cross is not in all respects the equivalent of a statement that by stipulation a matter already set for hearing before Judge Cross had been continued to another day.

The statement in the affidavit conveys the idea of the *selection* of Judge Cross by the parties to the stipulation. It might have operated as a sufficient reason for inducing Department Two to deny the motion to vacate the former order, had the motion to vacate been based, not on the ground of inadvertence or want of information when the former order was made, but on some

objection merely personal to Judge Cross. It was a declaration under oath which could not have deceived the court, not because it did not vary from the exact truth, but because its legal effect was the same as the exact truth.

It is urged, however, that the averment in the affidavit, admitting it to have been verbally inaccurate, was in that respect made inadvertently. That the averment, so far as it bore on *the issue* then tried, was legally of the same effect as if the very words of the stipulation had been recalled, and that it cannot be supposed the respondent was ignorant (or believed the court ignorant), that the mere fact the parties had stipulated that Judge Cross should settle the bill would be no answer to the motion to vacate. That it cannot be presumed a lawyer of conceded intelligence and learning would have wilfully stated a falsehood so easily exposed by the production of the stipulation.

It is further urged that the real purpose for which the affidavit was made and read is apparent from an examination of the motion papers. From such examination, respondent claims, it is seen, that the fact deemed *material* by the affiant was the fact that R. E. Arick, Esq., the attorney for the administrator, had stipulated to a postponement of the settlement of the bill of exceptions by (or before) Judge Cross; that from that fact respondent might argue that Messrs. Flournoy, Mhoon & Flournoy ought not to be heard by Department Two of this court on a motion to set aside the order previously made; that the fact of the appearance and consent of *Arick*, and not the precise wording of the stipulation, was *the* fact to which the attention of respondent was directed when he prepared, subscribed, and swore to the affidavit.

A judgment against the respondent will deprive him of personal and property rights.

Unless we are clearly satisfied of respondent's guilt we ought not to remove or suspend him from the practice of his profession. As we are not so satisfied we decline to strike his name from the roll.

We feel bound to remark that it is always somewhat dangerous to swear to the "legal effect" of a matter in the form of a positive averment.

It is certainly less hazardous to give the language of a written

instrument or (if the instrument is lost or beyond the affiant's control) to state that the exact language is not remembered, and to give the substance of the language; that is, to use language which conveys the precise idea expressed by the words contained in the instrument.

The facile and ready method of meeting an issue by affidavit of an attorney in the action or proceeding is not to be encouraged. The present proceeding will have subserved a useful purpose if it shall have a tendency, in any degree, to bring about a discontinuance of the frequent and unnecessary manufacture of affidavits; a practice to which resort is had, too often carelessly, and sometimes, we fear, recklessly.

The application for the disbarment of respondent is denied.

MORRISON, C. J., MYRICK, J., ROSS, J., MCKEE, J., and THORNTON, J., concurred.

[No. 7883.—In Bank.—September 26, 1885.]

WILLIAM BUTCHER, RESPONDENT, v. VACA VALLEY
AND CLEAR LAKE RAILROAD COMPANY, APPEL-
LANT.

NEGLIGENCE—RAILROAD—DAMAGE CAUSED BY SPREADING FIRE—PLEADING—EVIDENCE—VARIANCE.—The action was against a railroad company to recover damages for injuries caused by fire. The complaint alleged that through the negligence of the defendant fire from its locomotive was suffered to escape and did escape, and by reason thereof came upon the land of the plaintiff, causing the injury complained of. The evidence was that the fire commenced on the land of another, from which it spread to the land of the plaintiff. *Held*, that there was no variance.

ID.—ORDINARY RESULT OF NEGLIGENCE—QUESTION FOR JURY.—In such a case, the question whether the damage done to the plaintiff was an ordinary and natural result of the negligence must be determined by the jury from all the circumstances proved.

ID.—RIGHT TO USE FIRE—UNAVOIDABLE INJURY.—A railroad company authorized by its charter to use steam power necessarily has the right to use fire as a means of generating steam, and is not liable for injuries unavoidably produced by the fire kept for such purpose.

ID.—EVIDENCE OF SIMILAR FIRE.—On the trial, a witness testified that about two weeks after the fire complained of, at a place from a quarter to half a mile distant from the spot where it was kindled, he saw fire in a field near the defendant's road, just after a train had passed, drawn by the same engine from which it was claimed the sparks escaped causing the damage to the plaintiff. *Held*, that the evidence was admissible.

Id.—SUBSEQUENT REPAIRS TO ENGINE.—Evidence is also admissible that soon after the fire the engine was repaired so as more effectively to retain the sparks.

Id.—REVIEW OF THE EVIDENCE—CONCLUSION.—On a review of the evidence, *held*, that the negligence of the defendant was *prima facie* established.

APPEAL from a judgment of the Superior Court of Solano County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Jos. McKenna, for Appellant.

G. A. Lamont, and *Walter Van Dyke*, for Respondent.

McKINSTRY, J. — No exception was taken to any portion of the charge of the court to the jury.

The complaint alleges that, on a certain day, the defendant was engaged in running its trains on its railway, "and while so engaged, by reason of the carelessness and negligence of said company and the engineers and employees thereof, the fire from the engine and locomotive of said road was suffered to escape and did escape, and by reason thereof *came upon the land of the plaintiff* herein, and consumed," etc.

There was evidence to prove that the fire commenced on the land of one *Wilson*, and from thence spread and extended to the land of plaintiff. The defendant, in due form and at the proper time, objected to any evidence "being admitted under these pleadings which tends to establish, show, or indicate any other initial point of the fire than that alleged in the complaint."

The objection is that there is a substantial variance between the averment of the complaint and the evidence offered.

The averment is that the fire having escaped "came upon the land" of the plaintiff, and consumed and destroyed his crop, etc. We are not prepared to say that the mere fact that fire, arising out of the negligent act of a defendant, on the premises of one proprietor, has extended to the premises of another, always and necessarily gives a cause of action to the latter. As was said in *Henry v. S. P. R. R. Co.* 50 Cal. 182:—

"It is said that the nonsuit should have been granted, inasmuch as the fire was not kindled in plaintiff's field, but in the field of one *Cagney*, an adjoining proprietor, from which it extended to the field of the plaintiff.

"The legal proposition involved in the foregoing statement is, that if by negligence a fire shall commence on the premises of one proprietor and spread from thence to those of another, the latter shall never have his action against him guilty of the negligence. We think this proposition cannot be maintained. To refute it, it is not necessary to establish the counter-proposition that the adjoining proprietor thus injured shall always recover. It may be assumed, perhaps, that a city fire which has its origin in one building will not, ordinarily, extend throughout a block; and yet a jury may be justified in saying when a fire is started in a field which constitutes a portion of a larger tract of dry grass, or corn fully ripe, that it will usually be driven into another field, from which the first is separated only by a fence of boards. It is a rule applicable to all cases of mere negligence that the wrong-doer is liable for the proximate and not for the remote consequences of his default. A long series of judicial decisions has defined proximate, or immediate and direct damages, to be the ordinary and natural results of the negligence, such as are usual and as, therefore, might have been expected; and this includes in the category of remote damages such as are the result of an accidental or unusual combination of circumstances which would not be reasonably anticipated, and over which the negligent party has no control. In *Ryan v. N. Y. C. R. Co.*, cited by appellant's counsel, the court held when a railroad company negligently set fire to its own wood-shed, and the sparks communicated the fire to and destroyed the house of another proprietor 130 feet from the shed, that no cause of action existed in favor of the owner of the house. (35 N. Y. 210.) In that case no new principle was involved. The learned judge who delivered the opinion placed the decision on the ground that the burning of the house was not to be expected from the first firing. (See *Webb v. R. W. & O. R. Co.* 49 N. Y. 420.) It would be strange if, among the numerous cases in which resort has been had to the rule of the law of negligence to which we have referred, courts had not differed in their application of the rule; but for the purposes of this action it may be admitted that the rule was properly applied in *Ryan's* case. We are still confident, considering the long dry season of California and the prevalence of certain winds in our valleys, that it may be left to

a jury to determine whether the spreading of a fire from one field to another is not the natural, direct, or proximate consequence of the original firing."

It is laid down by Shearman and Redfield: "One who . . . by want of ordinary care sets fire to land which does not belong to him, is responsible for all the proximate consequences of his act, not only to the owner of the land on which the fire begins, but also to the owner of any other property which the fire may reach in its spread." (On Negligence, 330.) But the case referred to by them, *Finley v. Langston*, 12 Mo. 120, merely holds that (under a statute which declared that whoever wilfully sets on fire a prairie or woods, and that fire occasions damage to another, shall be liable to a certain penalty) a defendant was liable who started a fire on *his own* premises which extended to those of his neighbor.

It is not necessary here to decide that the mere fact that the fire commenced in the field of one man and extended to another would establish *prima facie* that the damage done in the second field was an ordinary and natural result of the defendant's negligence. That was a matter to be determined by the jury, in view of all the circumstances proved. It is enough to say such damage might be an ordinary and natural consequence.

It will be observed that no objection was made to the sufficiency of the complaint by demurrer or otherwise. There is no suggestion that the mere statement in the complaint of facts tending to prove that the injury done to the plaintiff was caused by the negligence of the defendant, is not a direct averment that the defendant set fire to the plaintiff's crop, or that the destruction of his crop was the direct consequence of the negligence of defendant. If the complaint was defective, we think the defect was cured by verdict.

The averment is that the fire started by the defendant came to plaintiff's land. This is not an allegation that it began on his lands, and we think the averment was sustained by evidence that it came to his lands from the lands of another. The precise objection of variance was not well taken.

In *Henry v. S. P. R. R. Co. supra*, the court also said: "We think there was no error in permitting proof that prior and subsequent to the fire which produced the injury complained

of, other fires *were kindled* by defendant's engine. The evidence was confined to fires caused by the *same engine, in the same vicinity*, and about the same time."

At the trial of this cause a witness, Sherman Marshall, was permitted, notwithstanding the objection of defendant, to testify that about two weeks after the fire which is alleged to have burned the plaintiff's property (at a place from a quarter to one half a mile distant from the spot where the fire in question here was kindled), he saw fire in a field near the defendant's road, just after a train of cars had passed, drawn by the same engine from which, as claimed, the fire escaped which caused the damage sustained by plaintiff.

Evidence that sparks and burning coals were frequently dropped by engines passing upon the same road upon previous occasions has been held to be relevant and competent to show negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter. (Sherman & Redfield, 333; *Field v. N. Y. Central*, 32 N. Y. 339; *Sheldon v. Hudson River*, 14 N. Y. 218; 67 Am. Dec. 155; *Henry v. S. P. R. R. Co. supra.*) So evidence that sparks have frequently been carried by the wind, etc. (*Sheldon v. Hudson River, supra*; *Piggatt v. Eastern Counties*, 3 Com. B. 229.) As was said in *Henry v. S. P. R. R. Co.*, "evidence is admissible if it is of a circumstance which, with other circumstances, may bring home to the mind a conviction of the main matter in issue. There may be difficulty in many instances in drawing the line of separation between evidence which thus tends to establish the issue, or from which, in accordance with ordinary experience, a reasonable inference may be drawn as to the principal matter in dispute, and evidence of facts simply collateral. The last class of evidence is not admissible." (1 Greenleaf on Evidence, 448.)

In the aspect of the case most favorable to defendant, there is no evidence in the record that the fire which caused the destruction of plaintiff's crop was caused by defendant's engine, other than the fact the fire commenced, or was seen, very soon after the engine passed, and that a high wind was blowing. As an inference from these facts, considered with or without reference to evidence as to the character of the engine, its management, etc., the jury may have been authorized to find

that the engine caused the fire. Conceding evidence that engines of defendant communicated fire to other property, on other occasions, would tend to show negligence, and to render it more probable that the fire was, in this case, so communicated, can facts from which a similar inference might be drawn give greater force to the *inference* that the fire which destroyed the plaintiff's property came from the defendant's engine, because the engine had just passed and a wind was blowing? The witness did not swear that, on the occasion to which he testified, he saw sparks issuing from the smoke-stack. Certainly such evidence approximates very closely the line which separates evidence merely collateral and independent from evidence bearing upon the issue made by the pleadings. It may be said to be an attempt to add to a probability by another probability; to support an inference by an inference. Yet, if it is permissible by direct proof to show that other fires were caused by defendant's engines, is it not permissible to show facts tending to prove that other fires were so caused? If many fires had occurred along the line of defendant's road, under circumstances like those appearing in the present case, the fact would have tended to prove negligence on the management of defendant's business, and that this particular fire was started by sparks from the locomotive. Proof of a single fire should have much less weight than proof of many fires, but we cannot say it was absolutely irrelevant.

The defendant moved for a nonsuit on the ground that plaintiff had given no evidence of negligence.

In some of the States (Maine, Massachusetts, New Hampshire), railroad companies are made by statute absolutely liable for injuries cause by fire proceeding from their engines, irrespective of their negligence. (Shearman & Redfield on Negligence, 344.) Our attention has been called to no such statute of this State. In the absence of statute, the rule is that inasmuch as railroad companies, authorized by charter to use steam power, have necessarily the right to use fire as a means of generating steam, and are therefore not liable for fires *unavoidably* produced by keeping fire for such a purpose—"one who seeks to recover on account of injuries caused to his property by sparks, smoke, or coal escaping from a locomotive, the use of

which is authorized by law, must prove some negligence apart from the mere fact of injuries," etc. (Shearman & Redfield, 332). It has been said, however, that the plaintiff may rely upon a *presumption* as evidence of negligence. In the opinion of the learned writers already quoted, the rule most just, and sustained by the best authorities, is: "The origin of the fire being proved, it rests upon the defendant to show that it used all necessary precautions to avoid doing such mischief. The natural presumption would be that by the use of ordinary care engines could be constructed so as to avoid such consequences; and if that is so, a presumption of negligence arises from their not being so constructed." (§ 333.)

In the case at bar it is not necessary, however, to appeal to the presumption of negligence mentioned by Shearman and Redfield. Even where that doctrine has been denied, "it is held that a presumption of negligence is raised by evidence that engines can be, and are sometimes so made as to retain their sparks." (§ 333.)

In *Hull v. Sacramento Valley R. Co.* 14 Cal. 387, 73 Am. Dec. 656, it was held the fact that fire was communicated from defendant's engine to plaintiff's grain, with proof that this result was not probable from the ordinary working of the engine, was *prima facie* proof of negligence, sufficient to go to the jury. And so it was decided by the Supreme Court of North Carolina that, although the position is not tenable, that whenever damage is done the law implies negligence, yet when the plaintiff shows damage resulting from the act of the defendant, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence. (*Herring v. W. & R. Co.* 10 Ired. 402; 51 Am. Dec. 395. And see also *Piggatt v. Eastern Counties R. Co.* 3 Com. B. 228.)

In the case before us the plaintiff proved by the witness A. J. Stevens, the general master-mechanic of the Central Pacific Railroad Company, that a perfect engine, properly equipped and properly run, will not ordinarily throw out sparks sufficient to start a fire.

The plaintiff also proved, by Joseph Erhart, the engineer in charge of the engine when the fire occurred, that a little more than two weeks afterwards some repairs or changes were made

by defendant in the engine. At the time of the fire the trap-door (or opening into the smoke-stack) had two nettings one inch apart. One of these was removed to the top of the smoke-stack. This testimony was objected to on the ground that it was immaterial and irrelevant.

We cannot say the evidence was totally irrelevant. It might fairly be argued that more sparks would issue from the smoke-stack before the change. The valve being opened, and the draft increased, live cinders lying between the two nettings (one inch apart) might be forced beyond the upper netting. In such case it might be argued that more sparks would escape from the stack than if there was a larger space between the two nettings in which the cinders or sparks might die out.

The plaintiff also gave evidence tending to prove that the *Vacaville* (the locomotive in question) was a small, light engine, not more than half the weight of engines ordinarily employed, and that opposite the place where the fire commenced it was pulling a long train up a "grade"; that "she had to exert herself to pull much of a train"; that an engine with short flues is more liable to throw fire through the smoke-stack than one with longer flues, the fire having less distance "to travel"; that there was a curve near the place where the fire destructive of plaintiff's property occurred, which increased the pull up the ascent; and that when attacking a grade it was usual to give more steam, the effect of the exhaust being to increase the draft.

We think there was sufficient evidence of negligence to send the case to the jury.

The plaintiff having made out his case *prima facie*, it remained for the defendant to overcome it by showing that it had used all reasonable care and diligence in securing a proper engine, and in the management of it to prevent the happening of fires. Taking the whole case as presented by the parties there was a substantial conflict of evidence, with respect to the issue of negligence, and in accordance with the established rule, we are not authorized to set aside the verdict.

Judgment and order affirmed.

MORRISON, C. J., MYRICK, J., THORNTON, J., and McKEE, J., concurred.

[No. 9801.—Department One.—September 28, 1885.]

THE PEOPLE, APPELLANT, v. H. M. LA RUE ET AL.,
RESPONDENTS.

SWAMP LANDS—RECLAMATION DISTRICT—PUBLIC CORPORATION.—A swamp and reclamation district is a public corporation for municipal purposes.

ID.—DE FACTO CORPORATION—LEGALITY OF ITS ACTS.—A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world, except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the State, except in direct proceedings to arrest its usurpation of power, its acts are binding.

ID.—REORGANIZATION—LEGALITY OF ORIGINAL DISTRICTS.—Swamp land levee and reclamation districts *de facto*, acting as such in good faith and under an attempted compliance with the law, may, under section 3489 of the Political Code, be united, consolidated, and reorganized, so as to form a new corporation in all respects valid, and proceedings in the nature of *quo warranto* against such new corporation cannot be extended to an inquiry and determination as to the legality of the organization of the original districts.

PRIVATE CORPORATION—POWER TO HOLD REAL ESTATE—PRESUMPTION.—Every corporation is presumed to have power to purchase and hold real estate, and if there is anything in its charter, or the business in which it is engaged, or the law under which it is organized, abridging this power, it must be shown affirmatively.

APPEAL from a judgment of the Superior Court of the county of Sacramento, and from an order refusing a new trial.

The facts are stated in the opinion.

Attorney-General Marshall, Grove L. Johnson, W. H. Beatty, and John W. Armstrong, for Appellant.

A. P. Catlin, for Respondents.

SEARLS, C. — This is an action in the nature of *quo warranto*, to determine whether there is any such corporation as Reclamation District No. 407, and whether the defendants Hugh M. La Rue, Samuel Lavenson. and William Wilcox are trustees thereof.

The defendants set up in their answer that two reclamation districts existed under and by virtue of the laws of the State of California, known and designated respectively as districts No. 89 and No. 215, and that Swamp Land Reclamation District No. 407 was formed under section 3489 of the Political Code

of the State of California by the *reorganization and consolidation* of said districts 89 and 215.

The cause was tried by the court without a jury, and defendants had judgment, from which and from an order denying a motion for a new trial this appeal is prosecuted by the plaintiff.

It was admitted at the trial that defendants were elected trustees of Swamp Land District No. 407, pursuant to an order of the board of supervisors, and after due notice thereof.

The whole controversy is involved in appellant's third assignment of error, which is as follows:—

“The evidence is insufficient to justify the judgment in favor of defendants, because the evidence clearly shows that district No. 407 was formed out of districts No. 89 and No. 215, and that said districts No. 89 and No. 215 were never legally, or at all, organized, and that consequently district No. 407 was never legally, or at all, organized, and that consequently defendants were claiming to hold an office and to exercise a franchise that never existed.”

We think the evidence sustains the assertion that district No. 89 and No. 215 had gone through the form of organizing, and had for some years acted as swamp land districts—that they were *de facto* corporations, and it seems to be tacitly conceded, though not directly admitted, that there were irregularities in their proceedings which would have been fatal to their existence in a direct attack on the part of the people.

We shall, consequently, for the purposes of the decision, assume that districts No. 89 and No. 215 were *de facto* corporations, and *were not* corporations *de jure*.

Section 3489 of the Political Code provides that “swamp land, levee, and reclamation districts formed, organized, or erected into districts under special or general laws heretofore or now in force may reorganize and consolidate in the manner following: Whenever the owners of a majority of acres of land in each of two or more swamp land, levee, or reclamation districts shall desire to consolidate and reorganize, they may do so by filing a notice with the county recorder of the county in which the greatest portion of the land of the districts is situated, setting forth that they desire to consolidate and reorganize. The notice must give the exterior boundaries of the said district, the name

and number of each of them, the number of acres of land that each contains, and must be signed by the persons owning the majority of acres of land in each district, and shall designate the number of acres owned by each signer in the district in which the same is situated."

The section proceeds further to make it the duty of the county recorder to record the notice, to make and forward to the State land register a certified copy thereof; whereupon the latter must designate a number for the reorganized district the same as provided for in original organizations, and thereafter the district so organized shall be under the operation and be governed by the general laws, and all proceedings thereafter shall be the same as in organizing districts upon original petition.

The proceedings for the organization of the present district under section 3489 of the Political Code seems to have been substantially in accordance with the requirements of that section, and of the general statutes relating to and governing the same, and unless in this proceeding the regularity of the organization of the original districts No. 89 and No. 215 may be inquired into, the judgment of the court below should be affirmed.

It has been determined by this court that a reclamation district is a public corporation for municipal purposes. (*Dean v. Davis*, 51 Cal. 409.)

Reclamation District No. 407 is either a corporation, or it is not. The whole theory of this action proceeds upon the ground that districts No. 89 and No. 215, not having been organized as by law provided, had no legal entity, and could not therefore serve as a basis upon which to organize by consolidation a new district, and as a consequence that No. 407 has in the eye of the law no existence.

If it is, and at the time this action was brought, was a corporation, the action must fail, for its sole object is to determine judicially that there was no such district, and no such offices as those claimed by defendants.

The question of the reclamation of the swamp and overflowed lands of the State, is one that has received much attention at the hands of the legislature, numerous statutes bearing upon the subject, and having the same general object in view, had prior to 1878 received the sanction of the law-making power.

Under these statutes a large number of swamp land districts had been organized, governed by separate and sometimes opposite laws.

The object in every case was, no doubt, to reach the same general result, and to vary the means so as to meet the requirements of different cases and classes of cases. The result of this varied legislation, however, was to so far complicate the system that no general and comprehensive rule could be formulated and adopted and a multitude of swamp land districts existed, each governed by its own special law.

To bring all these swamp land districts within the operation of general laws seems to have been one of the objects of the amendment of 1878, embodied in section 3489 of the Political Code.

Under that section new districts are created.

It provides for the filing of a notice, and prescribes the contents of such notice and the mode or number of persons by whom it must be signed.

Upon recording this notice and furnishing a certified copy to the State land register, that officer is required to designate number for the organized district, after which it shall be under the operation of and governed by the general reclamation laws of the State, and all proceedings thereafter shall be the same as though such district was organized upon an original petition.

The statute does not propose any method, or delegate to any officer, authority to inquire into the regularity of the proceedings by which the original districts were formed.

Indeed it does little more than to adopt the territorial limits of the old districts as the boundaries of the new.

In reason we can see no objection to the formation of a valid corporation under section 3489, by consolidating two or more districts existing as such in fact, and entitled to recognition as such by all the world, except the State of California, and by the State even, except in direct proceedings against it, to determine its right to exercise corporate powers.

The object of the law is to promote the formation of corporations for the reclamation of waste lands.

It would seem from some of the language used in the latter portion of section 3489, that the legislature contemplated the

reorganization and consolidation of districts which had not been legally organized, for it is provided that such reorganization shall not be so construed as to validate such original organization.

“Nor shall any indebtedness or any act of said districts, or the officers thereof, prior to the act of reorganization and consolidation be legalized by this act.”

If valid districts *could not* be created by reorganizing those which were invalid, clearly there could be no reason in providing that such reorganization should not validate the original districts.

The organization of a *void corporation*, or to be more precise, an attempt to organize a corporation which utterly fails, cannot give a legal status to anything.

It appears as though the law-makers contemplated cases in which valid corporations might be created over a district in which irregular and invalid districts had existed, and lest such reorganization should be taken as evidence of approval of the acts and indebtedness of such pre-existing districts, inserted the language therein contained.

It is as though the legislature had said you may reorganize and create valid corporations for municipal purposes by uniting two or more corporations irregularly organized, but in so doing you cannot legalize the original bodies, and this law under which you are permitted so to do, shall not legalize any act or indebtedness of the original districts performed or incurred *before* you reorganize.

In saying the previous acts should not be legalized, we think the legislature intended the converse of the proposition should also be true, and that the *subsequent acts* of a corporation, formed out of such material as we are considering should be valid.

And we may ask why not?

A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the State, except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious.

How then stands the case? Swamp Land Districts No. 89 and No. 215 have never been the subject of a direct attack by the

State to arrest their charters, or what under our law is the same thing, to stay their exercise of corporate functions.

As to those corporations, this is a collateral attack.

We think it should not prevail, and that swamp land, levee, and reclamation districts *de facto*, acting as such in good faith and under an attempted compliance with law, may under section 3489 of the Political Code, be united, consolidated, and reorganized so as to form a new corporation in all respects valid, and that proceedings in the nature of *quo warranto* against such new corporation, cannot be extended to an inquiry and determination as to the regularity of the several steps by which such original swamp land, levee, and reclamation districts were organized.

It was further objected at the trial to the introduction of the petition for the organization of Reclamation District No. 407, "that it shows it was signed by the Pacific Mutual Life Insurance Company, a corporation, and there is no proof that the corporation is authorized to hold real estate."

It is said by Angell & Ames on Corporations, at section 110 that "both by the laws of England and the United States, there are several powers and capacities which tacitly and without any express provision are considered inseparable from every corporation. Kyd enumerates five of these as necessarily and inseparably belonging to *every* corporation."

In enumerating them, the third in number is the right or power "to purchase lands and hold them for the benefit of themselves and their successors."

The presumption is that the corporation in question had the right to purchase and hold the lands by it represented.

If there was anything in its charter or the business in which it was engaged, or in the law under which it was organized, in any manner abridging its right to hold land, it does not appear of record, hence we deem the objection untenable.

Upon the whole case as presented, we are of the opinion the judgment and order appealed from should be affirmed.

FOOTE, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 8445. Department One.—September 28, 1885.]

STUART S. WRIGHT, RESPONDENT, v. THE CENTRAL CALIFORNIA COLONY WATER COMPANY ET AL., APPELLANTS.

CORPORATION—ELECTION OF DIRECTORS—ACTION TO SET ASIDE—WHO MAY MAINTAIN.—A stockholder in a corporation may maintain an action to set aside an election of directors of the corporation, although at the time of the election no stock had stood in his name on the books of the corporation sufficiently long to entitle him to vote.

ID.—JURISDICTION.—The Superior Court has jurisdiction as a court of equity to inquire into the validity of such an election, and to set it aside if not made in conformity with law.

ID.—MANNER OF VOTING.—Every qualified stockholder present at an election has a right to vote at one time the number of shares owned by him for the whole number of directors to be elected, or to cumulate his shares upon one candidate, or to distribute them among as many candidates as he may see fit; and the corporation has no power to adopt any other mode of election.

APPEAL from a judgment of the Superior Court of the county of Fresno, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Campbell & Goss, for Appellants.

Stuart S. Wright, and *W. Barry*, for Respondent.

McKEE, J.—This was a proceeding to set aside an election for seven directors of the Central California Colony Water Company, a corporation organized and existing under the laws of this State, having a capital stock of \$30,000, divided into 192 shares of stock, of the par value of \$156.25 each.

It is claimed that the petitioner was not qualified to inaugurate the proceeding to set aside the election, because he was not a *bona fide* stockholder, having stock in his own name on the stock books of the corporation, at least ten days prior to the election; and that the court did not find on that issue.

But there was no such issue joined in the case. The petitioner merely alleged that he was a *bona fide* stockholder at the commencement of the proceeding. Of this allegation there was a denial; and upon the issue raised by the denial, the court finds that the election for directors was held on the 21st of September, 1881, and that on the 20th of September, the day before the

election, "the petitioner became a *bona fide* stockholder in said corporation, and has ever since continued to be a stockholder therein, having stock in his own name upon the stock book of the corporation."

That being the fact, it may be conceded that the petitioner was not a qualified elector of the corporation, under section 312 of the Civil Code, which provides that a *bona fide* stockholder, having stock in his own name on the stock books of the corporation, at least ten days prior to the election, is the only person entitled to vote at a corporate election. But while the petitioner may have been disqualified from voting at the election, he was not disqualified from instituting proceedings to set aside the election, if it was voidable; for by the same section of the Code, "any absent or other stockholder" is authorized to institute such a proceeding. Therefore, as a stockholder of the corporation, the petitioner had legal capacity to institute the proceeding commenced on the 29th of September, 1881.

It is urged, however, that even if the petitioner had the capacity to sue, the proceeding was improperly commenced in the Superior Court, because section 312 of the Civil Code, upon which the proceeding is founded, only authorized the filing of a petition in the District Court to set aside a voidable election; and as, at the time of the commencement of the proceeding, there was no District Court, and no law which authorized the filing of such a petition in the Superior Court, the proceeding was improperly commenced in the Superior Court.

The Constitution of 1879 abolished the District Court, but at the same time it created the Superior Court, and conferred upon it the same equity jurisdiction which had been formerly conferred upon and was exercised by the District Court. Sitting as a court of equity, therefore, the Superior Court had jurisdiction to inquire into the validity of an election and to set it aside, if it had not been made in conformity to law, whether the statute conferred it or not. (*Brown v. Pacific M. S. Co.* 5 Blatchf. 525; *Walker v. Deveraux*, 4 Paige, 225; *Webb v. Ridgely*, 38 Md. 364.) The abolition of the District Court did not destroy or affect the right to invalidate a voidable election. The remedy still existed in favor of any one aggrieved, and was enforceable by him in any court of competent jurisdiction of the subject-matter.

It is next claimed that the election was valid, and that the court erred in holding it to be invalid.

According to the finding of the court, the election was called "pursuant to a notice, which was, in all respects, published according to law"; and at the proper time and place for holding the election, a majority of the stockholders of the subscribed capital stock of the corporation met and organized and proceeded to elect seven directors. The records of the election show:—

"After some discussion the following motion was made and seconded: That the stockholders of the Central California Colony Water Company proceed to the election of officers of the said Central California Colony Water Company in the manner provided in the constitution of said company.

"Carried, sixty-two to ten."

And the court finds that the manner of conducting the election was this:—

"That prior to taking any vote in said election, the majority of said stockholders adopted a resolution to the following effect: That seven (?) ballots should be taken for directors; that each stockholder should vote on each of said ballots for one person and no more; and that the person receiving the majority of the votes cast on each ballot should be declared elected director for the ensuing year."

In this way seven separate ballots were taken in succession, and on each ballot the candidate receiving the highest number of the votes cast was declared a director, until seven directors were chosen.

A large number of stockholders present, including the petitioner, protested against the adoption of the resolution and the manner of conducting the election, and the court finds, as fact, that they "demanded to be allowed to cumulate their respective votes on one or more persons for directors, but that they were not permitted so to do, and were prevented from so doing by said resolution"; and as law, "that the election was not had in accordance with the provisions of article ii., chapter 1, part 4, of the Civil Code of the State of California, and that said election was and is illegal and void."

The decision is predicated upon the fact that the petitioner and

others as qualified voters at the election had the right, under the charter of the corporation, to cumulate their votes upon any one candidate, or distribute them upon two or more candidates; and that they were deprived of this right by the adoption of the resolution and by the manner of conducting the election.

Section 12 of article xii. of the Constiution of 1879 reads thus—

“In all elections for directors or managers of corporations every stockholder shall have the right to vote, in person or by proxy, the number of shares of stock owned by him for as many persons as there are directors or managers to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock shall equal, or to distribute them, on the same principle, among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner, except that members of co-operative societies, formed for agricultural, mercantile, and manufacturing purposes, may vote on all questions affecting such societies in manner prescribed by law.”

This section is understood to confer upon the individual stockholder, entitled to vote at an election, the right to cast all the votes which his stock represents, multiplied by the number of directors to be elected, for a single candidate, should he think proper to do so. So that the petitioner, as the representative of a single share of stock, if qualified under the charter of the company to vote, was entitled to cast seven votes for any one of the candidates for the office of director, or to distribute them among any two or more candidates. In that way a minority of the stockholders would be enabled to secure representation upon the board of directors by electing one or more of the directors. Such, doubtless, was the object of the provision; and the rule was considered of sufficient importance as to make it part of the organic law.

Under this rule a corporation holding an election for directors is bound to follow the constitutional mode. It has no power, by resolution or otherwise, to adopt any other. And when an election for directors has been properly called, each qualified stockholder present has the same right, in exercising his power

of voting for directors, to vote, at one time, the number of shares in his name, for the whole number of directors to be elected, or to cumulate his shares by voting for one candidate for director, as many votes as shall equal the number of his shares multiplied by the number of directors to be elected, or by distributing them, upon the same principle, among as many candidates for directors as he shall think fit.

We think the power thus conferred upon a corporate elector can only be exercised according to the constitutional provision by allowing him to cast his ballot singly, cumulatively, or distributively, *at one time*, for the election of directors. For if but one director at a time be balloted for, a majority of the stockholders could, by combining, cumulate their votes each time upon a single candidate and elect him; and by thus shaping and controlling the manner of the election, it would be in the power of the majority of the stockholders to virtually cancel the votes of the minority and deprive them of their rights to representation on the board of directors.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

[No. 9783.—Department One.—September 28, 1885.]

W. F. GOAD, APPELLANT, v. LINA MOULTON ET AL.,
RESPONDENTS.

DEED—FORM AND EFFECT—CONSIDERATION—HINDERING AND DELAYING CREDITORS—LEGAL TITLE.—No consideration need be expressed in a deed of conveyance in order to give it effect, nor is it material that the deed was intended to hinder and delay creditors, so far as its sufficiency to pass the legal tile is concerned.

MARRIED WOMAN—CAPACITY TO CONTRACT—PROMISSORY NOTE—HOLDER FOR VALUE.—In this State, a married woman may enter into any engagement or transaction respecting property, which it would be competent for an unmarried woman to enter into, and her capacity in this respect extends to the making of a promissory note for a consideration or the accommodation of another person; and such a note may be enforced by a holder for value against her separate estate, though taken by him with notice of the circumstances under which it was given.

APPEAL from a judgment of the Superior Court of the county of Colusa, and from an order refusing a new trial.

The facts are stated in the opinion.

H. M. Albery, for Appellant.

Consideration need not be expressed in a deed. (3 Wash. Real Prop. 3d. ed. p. 320, and cases cited; *Campbell v. Whitson*, 18 Am. Rep. 555; *Den v. Hawks*, 5 Ired. 30; *Cathcart v. Robinson*, 5 Peters, 264; *Miller v. Marckle*, 21 Ill. 152; *Larabee v. Carlton*, 53 Me. 211; Boone on Real Prop. § 292). A voluntary conveyance made without consideration, and to defraud creditors, is good as between the parties. (1 Story Eq. Juris. § 371, and cases cited; *Campbell v. Whitson*, *supra*; *Goward v. Waters*, 98 Mass. 599; Boone on Real Prop. § 292, and cases cited.) A married woman in this State can contract with the same binding force as if she were a *femme sole*. (*Wood v. Orford*, 52 Cal. 412; *Marlow v. Barlew*, 53 Cal. 459; *Cartan v. David*, 18 Nev. 310.)

Hart & White, for Respondents.

BELCHER, C. C.—This is an action upon a promissory note, made by the defendant Lina Moulton to the defendant D. L. Moulton, and by him indorsed to the plaintiff.

The case was tried before a jury, and the verdict and judgment were in favor of the defendants.

The plaintiff moved for a new trial, and his motion was granted as to the defendant D. L. Moulton, and denied as to the defendants Lina and L. F. Moulton.

The plaintiff appeals from the judgment and the order in so far as it denied his motion for a new trial, and the defendant D. L. Moulton appeals from the order granting a new trial as to him.

By their answer the defendants alleged that the defendant D. L. Moulton, being at the time financially embarrassed, was advised by the plaintiff, who was his attorney, for the purpose and with the intent to delay his creditors, to transfer and convey, without consideration, all his property to the defendant Lina, and that she should hold the same until a settlement was made with his creditors, or until their claims should be barred by the Statute of Limitations, and then reconvey it; that the plaintiff

further advised and directed that in order that it might appear that a proper and sufficient consideration for the transfer of the property had been paid, and that the transfer had been made in good faith and not to hinder and delay creditors, the note in suit should be made and indorsed and then left with him; that in pursuance of the plaintiff's advice, the defendant D. L. Moulton conveyed his property to the defendant Lina, and then the note was made, indorsed, and given to the plaintiff, but without any consideration therefor, and with the express understanding and agreement that it should never be presented for payment.

At the trial it appeared that the defendant Lina was the daughter of defendant D. L., and the wife of defendant L. F. Moulton, and that she and her husband resided on a farm, distant somewhere between twelve and twenty miles from the land conveyed to her by her father, and that in December, 1880, she had conveyed the land so conveyed to her to one Harris, for the expressed consideration of \$16,000.

D. L. Moulton was called as a witness for the defendants and testified substantially to all the facts set up in the answer, and then against the objection of the plaintiff was permitted further to testify that he never delivered possession of any property under the deed to Lina, and that she never received any benefit from the sale of the land, and never got any property out of the whole transaction.

The foreman on the ranch of the defendant L. F. Moulton was then called as a witness, and referring to the land conveyed to defendant Lina, was asked: "Now state whether or not that land ever came under the dominion or control, or whether any occupation or exercise of control or use of that land was had by Mrs. Lina Moulton?" And again he was asked: "Was anything said to you, or did you ever have any directions from any one there—Mr. Moulton or Mrs. Moulton—respecting any action to be taken regarding this particular land?"

Harris, the purchaser of the land, was also called as a witness, and referring to the land conveyed to him by defendant Lina, was asked: "Did you find her in possession of that property when you went there?"

These questions were all objected to by the plaintiff as irrele-

vant, incompetent, and immaterial, and the objections were overruled and exceptions taken.

The plaintiff was called as a witness in his own behalf, and testified that he was not the attorney of the defendants, and that he did not advise the making of the conveyance to defendant Lina, or know of its being made till some time after its execution; that D. L. Moulton was indebted to witness and witness was urging payment; that Moulton told witness he had conveyed his land to Lina, and that she owed him \$2,500 for the purchase money; that Moulton asked witness to accept her note in payment, and he agreed to do so; that the note was accepted by him in good faith in payment of an indebtedness of an equal amount, the evidences of which were at the time surrendered and canceled; and that it was never agreed or understood that the note was not to be presented and paid at its maturity.

It is very evident, we think, that the court erred in admitting the testimony objected to.

The deed to defendant Lina was a good and operative deed, notwithstanding no consideration was expressed in it (§§ 1092, 1614, Civ. Code; 2 Hilliard on Real Property, 3d ed. 291), and it passed the legal title of the property to her, whether it was made to hinder and delay creditors or not.

She had power to make her promissory note for a part or all the purchase money, and to obligate herself for its payment, and a note so made, in the hands of an innocent purchaser for value before its maturity, is valid and binding upon her, whatever may have been the arrangement between herself and her father about its payment.

The real issues before the jury were: Did the plaintiff receive the note in suit without consideration and knowing it was not to be paid, as testified to by D. L. Moulton, or did he receive it in good faith and for its face value, and expecting it to be paid at its maturity, as testified to by him?

Upon these issues the testimony objected to was wholly irrelevant and immaterial, and tended to mislead the jury.

At the request of the defendants the court instructed the jury as follows:—

“If the jury believe from the evidence that the note sued on,

and introduced in evidence, was executed by Mrs. Lina Moulton, for the accommodation of D. L. Moulton merely, and without consideration, and that at the time she was a married woman, and that the plaintiff knew such facts, then he cannot recover."

The instruction in effect told the jury that if Mrs. Moulton was a married woman, and without consideration executed the note for the accommodation of D. L. Moulton, and the plaintiff knew these facts, then their verdict must be for the defendants. This was error.

In this State a married woman may enter into any engagement or transaction respecting property which she might if unmarried. (§ 158, Civ. Code.) A promissory note is an engagement respecting property which a married woman may make, though it can be enforced only as against her separate property. (*Marlow v. Barlew*, 53 Cal. 456; *Alexander v. Bouton*, 55 Cal. 15.)

If Mrs. Moulton had been unmarried she could have made a promissory note for the accommodation of her father, without receiving any consideration for so doing, and the note so made, in the hands of one who received it for value, would, beyond question, have been valid and binding upon her, though the holder knew how and why it was made.

But the fact that she was married does not at all change the rule or limit her power in this respect.

It does not appear why the court below granted the motion for new trial as to the indorser of the note and denied it as to the maker. There was no reason for granting it as to one and not the other, except that defendant Lina was a married woman, and, therefore, as claimed by counsel, not bound by her note. Being bound by it, as we have seen, if the testimony was insufficient to justify the verdict as to one, it was equally so as to both, and the new trial should have been granted as to both.

In our opinion the judgment and order as to defendant Lina Moulton should be reversed and the cause remanded for a new trial, and the order as to defendant D. L. Moulton should be affirmed.

FOOTE, C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order as to defendant Lina Moulton are reversed and cause remanded for a new trial, and the order as to D. L. Moulton is affirmed.

Hearing in Bank denied.

[No. 9911. Department Two.—September 28, 1885.]

LEWIN, RESPONDENT, *v.* W. E. HOPPING, APPELLANT.

TRANSFER OF PERSONAL PROPERTY—CONSIDERATION—CHANGE OF POSSESSION.—A transfer of personal property, in consideration of a promise by the transferee to use it for a public purpose, in such a manner that the transferrer will derive pecuniary profit from its use, is good as against the creditors of the transferrer, if accompanied by an actual, immediate, and continued change of possession.

APPEAL from a judgment of the Superior Court of Shasta County, and from an order refusing a new trial.

The facts are stated in the opinion.

Clay W. Taylor, and *L. W. Frisbie*, for Appellant.

Edward Sweeney, and *Chipman & Garter*, for Respondent.

FOOTE, C.—Action of claim and delivery. The plaintiff obtained judgment for the return of a certain wire rope, or its value, which had been seized in attachment by the defendant, as sheriff of Shasta County, at the suit of Chappel and Houston against one Joseph Waugh.

It appears that the plaintiff, being requested by a large number of the citizens of that county, had raised money by subscription from divers individuals, to complete a road to a certain point on the Sacramento River. That as an incident to that object, and as a part of the scheme, it was found advantageous to establish a ferry across said river at a place where a railroad could be reached, and this was where one Waugh kept a hotel. He possessed a certain wire rope, suitable for such a purpose and Lewin visited him and proposed to obtain it from him (on

his own behalf and that of these public-spirited citizens) as an aid to accomplish the end in view.

Waugh, for the consideration that his hotel would thereby receive increased patronage from the traveling public, and himself derive pecuniary benefit, and that a boat would be built by Lewin and those he represented, so that a ferry would be established, agreed to let the rope be used as desired by Lewin, and to make a permanent transfer of it for that express purpose. This he at once did, giving a written order therefor to Lewin, who took possession and control of and removed it to a warehouse, and left it there subject to his disposition. It remained in this situation for nearly a month before it was seized in attachment.

Some days after this transfer, but before the attachment levy, the board of supervisors of Shasta County subscribed \$300 towards aiding in the establishment of the ferry as a free and public one, and made an order, upon a petition of certain citizens asking that such a one be established at that point, that the franchise should be granted as prayed for, but for the convenience of having some individual to take out a license, they gave it to Waugh, although he had not petitioned therefor. Lewin had possession all this time of the rope, and was proceeding to get the ferry ready for use when the attachment was levied on the property in dispute, and although he claimed it as his own. it was taken and is still withheld from him, and he instituted this action to recover it.

It is urged by the appellant that Lewin had no title or right of possession to the property; that it was a gift from Waugh to unknown persons, and in fraud of the rights of creditors.

The intention of the parties to this transaction, as gathered from the evidence, was to establish a ferry at a given point, from which mutual benefits would flow to them. Lewin was one of a number of persons who, although their names are undisclosed, it would seem, could easily be identified, who upon their part had agreed to use their money in building a boat, and preparing the other things necessary to carry on the ferry as a free and public one. This agreement being communicated to Waugh, he, because of the promise on their part to fulfill it, and because he expected to realize pecuniary profit therefrom, trans-

ferred to the possession and control of Lewin, for the purpose specified, the custody, control of, and property in the rope. To his title and right of possession, no condition, mutual or precedent, was expressly attached, but actual, immediate, and continued change of possession was given him of the property, and such possession was maintained up to the time of the levy of the attachment, a period of nearly a month.

According to the testimony of Lewin, which is undisputed, he, for himself and those acting with him, was proceeding with "the erection of the ferry" at the time the defendant made the seizure in attachment.

It would seem, therefore, as if between Waugh and the plaintiff and those acting with him, the conditions of the transfer were being complied with, that the consideration for it was sufficient, and that there was no fraud or attempt to hinder or delay creditors shown by the record; and that Waugh had parted with his title and right of possession to the property in good faith, and in such manner as to bar him from bringing an action of claim and delivery against the plaintiff.

The findings are sufficient and are supported by the evidence.

There is no error shown by the record, and the judgment and order should be affirmed.

SEALRS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9983. Department Two.—September 28, 1885.]

PAUL SHIRLEY ET AL., RESPONDENTS, v. IRA BISHOP
ET AL., APPELLANTS.

NAVIGABLE STREAM—PUBLIC HIGHWAY—WATER FRONT OF BENICIA—RIGHT OF OWNER TO FREE ACCESS.—The navigable waters of the Straits of Carquinez, adjoining the permanent water front of the city of Benicia, as established by the act of March 21, 1868, are a public highway; and an owner of land, the boundary of which forms a part of the water front, has a vested right of free access to such highway, of which he cannot be deprived without compensation.

LD.—WHARF—NUISANCE—INJUNCTION.—The erection of a wharf materially obstructing such access will be enjoined as a nuisance.

APPEAL from a judgment of the Superior Court of Solano County.

The wharf of the defendants was being constructed under the authority of a franchise granted by the board of trustees of the city of Benicia. The further facts are stated in the opinion

J. F. Wendell, and J. & J. C. Lynch, for Appellants.

Plaintiffs had no vested right which could be impaired by the construction of the defendant's wharf. Angell on Tide Waters, 45, 66, 75, 206; *Morgan v. King*, 35 N. Y. 458; *Ex parte Jennings*, 6 Cowen, 518; *More v. Massini*, 37 Cal. 435; *Wood on Nuisance*, 538; 3 Kent Com. § 427; 2 Edm. on Injunctions, 272; *Eldridge v. Cowell*, 4 Cal. 80; *People v. Davidson*, 30 Cal. 379; *Guy v. Hermance*, 5 Cal. 73; *Ward v. Mulford*, 32 Cal. 365; *Rondell v. Fay*, 32 Cal. 354; *People v. Morrill*, 26 Cal. 358; *Teschemacher v. Thompson*, 18 Cal. 22; *Middletown v. Pritchard*, 3 Scam. 500; 37 Am. Dec. 112; *Garitt v. Chambers*, 3 Ohio, 495.) Plaintiffs are not entitled to an injunction. (Gould on Waters, § 123; *Bigley v. Nunan*, 53 Cal. 403; *Aram v. Shallenberger*, 41 Cal. 449; *George v. N. P. T. Co.* 50 Cal. 589; *Jarvis v. S. C. R. R. Co.* 52 Cal. 438.)

Stanly, Stoney & Hayes, and L.B.&S.Mizner, for Respondents.

The navigable waters adjoining the land of the plaintiffs were a public highway to which they had a vested right of free access, and of which they could not be deprived without compensation being first paid. (Const. of Cal. art. i. § 14; *Reardon v. San Francisco*, 66 Cal. 492; *Conniff v. San Francisco*, 67 Cal. 45; *Schulte v. N. P. T. Co.* 50 Cal. 592; *Blane v. Klumpke*, 29 Cal. 156; *Lackland v. R. R. Co.* 30 Mo. 180.) An injunction lies to restrain the erection of the wharf. (*Thornton v. Grant*, 10 R. I. 477; *Gray v. Bartlett*, 20 Pick. 186; *Frink v. Lawrence*, 20 Conn. 121; 32 Am. Dec. 208.)

FOOTE, C.—Action to prevent the construction of a wharf and to cause the removal of a portion thereof already constructed. The plaintiffs recovered judgment, there was no motion for a new

trial, and the cause comes to this court on the judgment roll alone.

Upon all material issues made by the pleadings, the findings were sufficient.

Among other facts it appears by the record that the plaintiffs are the owners of a block of land in the city of Benicia, which is bounded on the east by the navigable waters of the Straits of Carquinez; that by an act of the legislature of this State, approved March 21, 1868, "a permanent water front of the city of Benica was established"; that by said act the easterly line of lots 10 and 14 of said block of land were declared to be a part of said permanent water front; that the defendants were attempting to build a wharf out into the Straits of Carquinez, which if constructed would approach to within about three feet of the easterly line of lots 10 and 14 of plaintiff's block of land, and would run parallel with such line for about sixty feet, would be an obstruction to the free use by plaintiffs of said block of land, and permanently interfere with the comfortable enjoyment thereof. It would be a nuisance to the plaintiffs and their said property, and inflict on them serious and irreparable injury; that the piles already driven by the defendants at the time of the commencement of the action, and of the restraining order issued by the court below, constitute a material interference with the enjoyment by the plaintiffs of their said property, and was, and is, and if not restrained will continue to be, a nuisance to them and said property.

There was no compensation "first made or paid" plaintiffs for the damages to their said property, as should have been done in order to meet the requirements of section 14, article i., of the Constitution of California. (*Reardon v. San Francisco*, 66 Cal. 492.) The wharf if built by defendants as contemplated would deprive the plaintiffs of ingress and egress to and from their lots and the navigable waters of the State.

On the eastern side of said lots the navigable waters of the Straits of Carquinez are a public highway. (Pol. Code, § 23-48.) The free access to that *public water highway* was a *vested right* and privilege that belonged to the plaintiffs, and of which they could not be deprived in the manner claimed as legal in this contention. (Pol. Code, § 2919; *Schulte v. N. P. T. Co.* 50 Cal.

592; *Blanc v. Klumpke*, 28 Cal. 156; *Sackland v. N. M. R. R. Co.* 31 Mo. 181; Gould on Waters, §§ 123, 124, 149, 150, 154, and cases there cited.)

If the wharf of the defendants could be built and was allowed to stand, it would preclude the plaintiffs from building any wharf as to sixty feet of their water front, declared such by law, and would prevent ingress and egress of vessels from a wharf previously built by them on another portion of their water front, of said block of land, and this effect upon their land in the absence of all compensation would, if not prevented, result in injury grievous and irreparable, from which as threatened they should have relief.

It clearly appears by the findings that the defendants were creating a *nuisance* in the navigable waters of the State. (Civ. Code. § 3479; *Blanc v. Klumpke*, 29 Cal. 156.)

Under the circumstances of this case, it is not legal or equitable to construct and maintain the wharf as contended for by the defendants; it would be in disregard of private rights, and result in great and irreparable damage to private property, without compensation, for an *ostensible public use*.

There are other questions which arise, but it is unnecessary to discuss or decide them. It has been our care to examine all the many authorities cited by counsel on both sides of this controversy, which were attainable, and we have read with attention their very exhaustive briefs, but we are unable to perceive in either anything which seriously militates against the views we have expressed as being conclusive of this case.

The judgment of the court below should be affirmed.

SEARLS, C., and BELCHER, C. C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is affirmed.

Hearing in Bank denied.

[No. 7275. In Bank.—September 28, 1885.]

JAMES F. HIBBERD ET AL., RESPONDENTS, v. JOHN SMITH ET AL., APPELLANTS.

- DEED—WHEN TAKES EFFECT—DELIVERY—INTENT.**—A written instrument in the form of a conveyance of land does not take effect as a deed until it is delivered with the intent that it shall so operate.
- ID.—WHAT CONSTITUTES DELIVERY.**—What constitutes delivery is chiefly a question of fact, but a delivery is not complete until the grantor has so dealt with the instrument as to lose all control over it; and whether he has done so depends upon the intent to be deduced from all the surrounding circumstances.
- ID.—DELIVERY TO STRANGER—ASSENT OF GRANTEE—PRESUMPTION.**—The delivery of a deed to a stranger for the benefit of the grantee is deemed to be a constructive delivery to the latter only when his assent thereto or facts which authorize a presumption of such assent are shown.
- ID.—DEED—WHEN NOT PRESUMED BENEFICIAL—CONSIDERATION.**—A deed purporting on its face to be executed for the consideration of \$5,000 will not be presumed beneficial to the grantee, in the absence of any evidence that the consideration has been paid.
- ID.—JUDGMENT LIEN ACQUIRED BEFORE ASSENT OF GRANTEE.**—Where a deed presumptively beneficial to the grantee is delivered to a third person for his use, without his knowledge or prior authorization, the subsequent assent of the grantee to the delivery will not operate to defeat the lien of a judgment creditor of the grantor which attached to the premises sought to be conveyed after the date of the delivery and before the assent of the grantee.
- EXECUTION SALE—TITLE OF PURCHASER—RETURN OF SHERIFF—RELATION—PRIORITY.**—On a sale of land under an execution, the title of the purchaser does not depend on the sheriff's return to the writ. The title relates back to and takes priority from the date of the judgment lien, and not from the date of any real or pretended statutory levy.

APPEAL from a judgment of the late District Court of the Fourth Judicial District, and from an order of the Superior Court of the city and county of San Francisco refusing a new trial.

The facts are stated in the opinion of the court.

B. S. Brooks, T. H. Hittel, C. T. Botts, S. W. Holladay, Moses G. Cobb, John W. Dwinelle, and John Currey, for Appellants.

The delivery of the deed under which the defendants claim to Aughinbaugh, for the use and benefit of E. S. Chipman, operated to pass the title at the time of the delivery to the former. (*Schroeder v. Gurney*, 73 N. Y. 430; *Everett v. Everett*, 48 N. Y. 218; *Cecil v. Beaver*, 28 Iowa, 241; *Tallman v. Cooke*, 39 Iowa, 402; *Mather v. Corliss*, 103 Mass. 568; *Jones v. Swayze*, 42 N. J. L. 279; *Ruckman v. Ruckman*, 32 N. J. Eq.

259; *Black v. Hoyt*, 33 Ohio St. 203; *Mitchell v. Ryan*, 3 Ohio St. 377; *Merrills v. Swift*, 18 Conn. 257; *Tibbals v. Jacobs*, 31 Conn. 428; *Burt v. Cassety*, 12 Ala. 734; *Rawson v. Fox*, 65 Ill. 200; *Ernst v. Reed*, 49 Barb. 367; *Hastings v. Vaughn*, 5 Cal. 513.) The deed being beneficial to the grantee, his assent thereto is presumed. (*Souverbye v. Arden*, 1 Johns. Ch. 246; 1 Wood's Conveyance, 311, n. b; *Merrills v. Swift*, 18 Conn. 257; *Mitchell v. Ryan*, 3 Ohio, 377; *George v. McGregor*, 18 Cal. 587; *De Lavillain v. Evans*, 39 Cal. 123; *Le Cacheux v. Cutter*, 6 Cal. 519; *Nicoll v. Mumford*, 4 Johns. Ch. 629; *Church v. Gilman*, 15 Wend. 660; 30 Am. Dec. 82.)

J. P. Hoge, and *A. A. Cohen*, for Respondents.

The title of a purchaser of real estate at a sheriff's sale does not depend upon the return of the officer to the writ. (*Hibberd v. Chipman*, 50 Cal. 511; *Cloud v. El Dorado Co.* 12 Cal. 128; *Clark v. Lockwood*, 21 Cal. 220; *Hihn v. Peck*, 30 Cal. 280.) Where a deed is delivered for the use of the grantee to a third person having no authority to receive it, and is beneficial in fact, the law presumes the grantee will accept, not that he has accepted. An actual acceptance must exist to pass the title. But an actual acceptance cannot operate to defeat the rights of third persons which have attached subsequent to the delivery by the grantor. (3 Wash. Real Prop. 3d ed. 580, 581; *Hulick v. Scovil*, 4 Gilm. 175; *Townson v. Tickell*, 3 Barn. & Ald. 36; *Derry Bank v. Webster*, 44 N. H. 264; *Wheeler v. Emerson*, 44 N. H. 186; *Oznard v. Blake*, 45 Me. 602; *Johnson v. Farley*, 45 N. H. 509; *Goodsell v. Stinson*, 7 Blackf. 437; *Day v. Griffith*, 15 Iowa, 104; *Denton v. Perry*, 5 Vt. 382; *Younge v. Guilbeau*, 3 Wall. 641; *Samson v. Thornton*, 3 Met. 281; *Elsey v. Metcalf*, 1 Denio, 323; *Powers v. Russel*, 13 Pick. 69; *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Bodle*, 20 Johns. 187; *Maynard v. Maynard*, 10 Mass. 458; 6 Am. Dec. 146; *Bell v. Farmers' Bank*, 11 Bush, 34; *Thompson v. Jackson*, 10 Bush, 424; *Tuttle v. Turner*, 28 Tex. 773; *Kingsbury v. Burnside*, 58 Ill. 321; *Welch v. Sackett*, 30 Wis. 649; *Taylor v. Robinson*, 14 Cal. 396; *Stephens v. Buffalo etc. R. R. Co.* 20 Barb. 332; *Oliver v. Stone*, 24 Ga. 70; *Jackson v. Perkins*, 2 Wend. 317.)

The COURT.—The opinion heretofore delivered in the above case is hereby approved and adopted by the court on rehearing, with the addition thereto of the following authorities: *Welsh v. Sackett et al.* 12 Wis. 243; *Kingsbury v. Burnside*, 58 Ill. 310; *Comme v. Jackson*, 10 Bush, 424; *Budd v. Hays*, 11 Ky. 34; *Palmelee v. Simpson*, 5 Wall. 81.)

Judgment and order affirmed.

MCKEE, J., expressed no opinion; SHARPSTEIN, J., being disqualified, did not participate in the decision.

The following opinion above referred to was delivered in Bank on the 30th of July, 1884:—

THORNTON, J.—This action in our ordinary legal nomenclature is ejectment, to recover possession of a parcel of land situated in Alameda County. Judgment went for plaintiffs. Motion for a new trial by defendants was by order denied, and the defendants appealed from the judgment and order.

The main question discussed on the argument in this court relates to the delivery of a written instrument under seal bearing date 6th of January, 1855, purporting to have been made by William W. Chipman to Edward S. Chipman, and to convey the land in controversy.

As to this point the court below found the following facts:—

“That on the 6th day of January, 1855, said William W. Chipman signed and sealed a paper purporting to be a deed of grant, bargain, and sale to his brother, Edward S. Chipman, thereby purporting to convey the land described in the complaint in this action, and on the same day last named acknowledged the same in due form of law before William Hamilton, a justice of the peace of said county, and thereupon left said deed with said justice of the peace, until the same was handed to Gideon Aughinbaugh. The consideration mentioned in said deed was \$5,000, and other valuable considerations; but in fact nothing was paid by said Edward S. Chipman to said William W. Chipman as the consideration for said conveyance, but said William W. Chipman was, at the time of making said deed, indebted to said Edward S. Chipman.

“At the time of making and depositing said deed with said

justice, the grantee therein named, Edward S. Chipman, was a resident of Holmes County, in the State of Ohio, and had been such resident there for six months previously, and had no knowledge of the making of such conveyance to him until after the 30th of June, 1855.

“Nor was the same ever delivered before that time to any person authorized or empowered by him to receive it. Nor did he ever before that time assent to the said conveyance to him. Said Aughinbaugh, at the time he received said deed from said justice, had no authority or power from said Edward S. Chipman to receive the delivery thereof for him, nor had he ever any such authority or power.

“That afterward, and prior to February 22, 1855, Edward S. Chipman, the grantee in said deed, then being in the State of Ohio, said grantor, Wm. W. Chipman, requested the said Gideon Aughinbaugh, who was an acquaintance and friend of said Edward S. Chipman, to go to the office of said justice of the peace, Wm. Hamilton, and to get the said deed, and to hold the same for Edward S. Chipman, at the same time stating to said Aughinbaugh that the law required that the said deed should be delivered to somebody for the grantee to make it a valid conveyance, as he, the grantee, was absent.

“In pursuance of such request the said Gideon Aughinbaugh called at the office of said justice, asked for and received said deed from him prior to February 22, 1855, and held the same in his possession for Edward S. Chipman, but without the knowledge or authority of said Edward S. Chipman.

“About two weeks afterward, said grantor, William W. Chipman, called upon said Aughinbaugh for said deed, asking that he might take it to get it recorded, which he accordingly did, and the same was duly recorded at the request of said William W. Chipman, in the county recorder's office of Alameda County, on the 15th day of March, 1855.

“Said deed was delivered by the said William W. Chipman to the said Aughinbaugh, and was thereby intended by the grantor, William W. Chipman, as a delivery to and for the use and benefit of Edward S. Chipman, without condition or qualification.

“That afterward, June 30, 1855, the said Edward S. Chipman

returned from the State of Ohio to California, and shortly afterward took said deed into his own possession, and made several conveyances of parcels of the land described therein to other parties for full value, as elsewhere in these findings stated."

Other facts found by the court which bear on this question of delivery are as follows: That on the 1st day of March, 1855, the plaintiff Hibberd recovered in the District Court for Alameda County a judgment for the possession of a tract of land in the county of Alameda against W. W. Chipman and Gideon Aughinbaugh, and damages for withholding this land, amounting to \$8,600, and \$536.55 costs of suit, which judgment was duly entered of record and docketed in said court on the 1st day of March, 1855. On appeal, this judgment was affirmed with costs, at the April Term, 1856, and the remittitur was filed in the District Court last above named on the 27th of March, 1856. The plaintiffs claim the land in suit under an execution sale on this judgment, having been the highest bidders for the same, for the sum of \$1,200.

It will thus be seen that both parties claim under W. W. Chipman, the plaintiffs under the judgment, execution sale, and sheriff's deed above mentioned, and the defendants under the alleged deed to E. S. Chipman.

The court also found as a conclusion of law that the paper purporting to be a deed just above stated was, under the circumstances set forth in the foregoing findings of fact, void for want of a valid delivery, as against the title acquired by plaintiffs under the judgment above mentioned by sheriff's sale, "as set forth in said findings of fact." The reference here is to the findings above stated.

The act solemn and authentic, done in writing in form apt for the conveyance of land, with signature and seal, does not take effect as a deed until delivery with intent that it shall so operate. The elements going to make up such a paper all constitute an act *factum* or deed, but not complete until the paper has been delivered with the intent above mentioned. The intent with which it is delivered is all important. This restricts or enlarges the effect of the instrument. It may be delivered to another person as a mere custodian, or to such person to be kept by him and delivered to a third person on a condition performed, or the

happening of a certain event, or it may be delivered that it may have full operation as the deed of the party delivering it. This may be done in various modes. It is impossible to state *a priori* in exact terms what shall or shall not constitute a delivery, that the paper may have its full operation as a deed. It is to a great extent a matter of fact depending upon intent, and under such circumstances the intent as evidencing what the maker of the instrument meant to do, must be found from the circumstances of the transaction, the *res gestæ*, and while some general rules may be and are laid down in regard to it to ascertain such intent, the intent must be found as a fact, and cannot always be determined as matter of law. There are some cases in which the intent is so plainly indicated by the *res gestæ* that but one conclusion can be deduced. Take the case of the delivery of such an instrument to a third person as a mere custodian for the party giving it, its solution is plain that there is no delivery of the paper to make it operative as a deed. Take another case of such a paper handed by the grantor to the grantee, with the declaration this is my act and deed, a delivery would be so plainly intended that no other conclusion could be reached. A third case of the delivery of such an instrument by the maker to a third person with directions to keep it and hand it to a person named as grantee in it, on the payment by him of a sum of money, the payment of the sum of money, and the tradition of the paper as directed having been made, no other result could be reached than that the paper became by such delivery an operative conveyance. These cases are simple, but in other cases where the intent is to be inferred from circumstances in their very nature equivocal, the solution as to delivery or not becomes one of difficulty, and depends so much on the subjective state of the mind of person or persons trying the issue produced by the evidence of the attending circumstances, that the law can lay down no certain rule on the subject. It then becomes a question of fact, and if there is evidence tending to sustain the finding of the court *a qua*, this court will not disturb it.

This is settled, that delivery is not complete until the person delivering (grantor) has so dealt with the instrument delivered as to lose all control over it. And whether he has so dealt with the instrument depends upon the intent to

be deduced from all the surrounding circumstances, the *res gesta*.

And this is all that is determined in *Hastings v. Vaughn*, 5 Cal. 318. The case as reported is a singular one, and we should infer from the report that it is inaccurate. The case as stated by the reporter is this: It was an action of ejectment against Vaughn and Shirley to recover possession of a lot in the city of Benicia. Shirley answered disclaiming all interest (it had not then been decided that such a defense was of no avail in the action of ejectment), and Vaughn answered denying generally the allegations of the complaint. The mayor and common council of Benicia intervened and claimed title to the lot in suit through a deed from Malinda Cooper and her children, who claimed under a deed from Stephen Cooper. This latter deed was drawn in the usual form, and signed by Stephen Cooper, and opposite his name was written the word "seal." This deed had been acknowledged before and recorded in Solano County, by the county recorder for that county, but did not bear on its face his official seal. The court refused to permit this deed to be read in evidence to the jury, to which defendants excepted. The report proceeds: "The jury found that there had been a sufficient delivery, and gave a verdict for plaintiff." How a jury could find as to the delivery of a deed which had been excluded from their consideration, we do not understand.

It is further stated by Heydenfeldt, J., who delivered the opinion of the court, that the only question before the court necessary to be examined was as to the exclusion of the deed of Cooper from the jury, the court below having held that the deed was void for want of the seal of the grantor; and second, that the record did not impart notice for want of the seal of the officer before whom it was acknowledged. To these objections the respondent adds, the deed was not delivered. What the respondent's objections had to do with the case it was difficult to see. Judgment had passed in his favor and he did not appeal. The court had excluded the deed because it was not sealed, and for lack of the official seal of the recorder to the acknowledgment. It does not appear that any question as to delivery was made in the objections to the paper offered in the court below. Yet the jury to whom it never got, passed on the question of

delivery, and the court on appeal proceeds to pass upon the same question. The decision amounts to nothing more than this, which was undoubtedly correct, that delivery depends more on intention than the mode of fulfilling the intention; that delivery is a question of fact depending on intent to be found by the jury. If what was said is anything more than *dicta*, what is above stated is all that was decided. The *dicta* to be sure are clearly correct. *Garnons v. Knight*, 5 Barn. & C. 673, is only cited to establish the rule stated above, which the court says is the correct doctrine, and laid down in that case.

The court further proceeds to say of this case: "There, it was left to the jury to decide as to the intention of the grantor. Many authorities are cited, and much good reasoning brought out, in support of the position that a deed will be operative although never parted with by the person who executed it." The court also cites as sustaining the rule that delivery is a question of fact to be determined by the jury, in addition to *Doe ex dem. Garnons v. Knight*; *Lindsay v. Lindsay*, 11 Vt. 521; *Vanhook v. Barnett*, 4 Dev. 268; *Hannah v. Swarner*, 8 Watts, 9.

The question of delivery being one of fact, the decision of the court below that there was no delivery cannot be reversed by this court, unless from the specific facts found, the law establishes the fact of delivery. Does the law on the facts found conclusively establish the conclusion that there was a delivery of the paper as a deed?

To recapitulate, the facts found are that in January, 1855, W. W. Chipman signed and sealed a paper purporting to be a deed of grant to his brother, E. S. Chipman, and on the same day acknowledged the same before one Hamilton, a justice of the peace, and left the paper with Hamilton. At the time of the happening of the aforementioned events, E. S. Chipman was a resident of Holmes County, Ohio, and had been a resident thereof for six months previously, and had no knowledge of the making of such instrument to him until after the 30th of June, 1855. Nor was this paper ever delivered at any time to any person authorized by E. S. Chipman to receive it. Nor did E. S. Chipman ever, prior to the 30th day of June, 1855, assent to such conveyance to him. That after the 6th day of January, 1855, W. W. Chipman requested Gideon Aughinbaugh to go

to the office of Hamilton, the justice above mentioned, get this instrument, and hold it for E. S. Chipman, at the same time stating to Aughinbaugh that the law required that the deed should be delivered to somebody for the grantee, to make it a valid conveyance, as the grantee was then absent. Aughinbaugh, in pursuance of this request called at the office of the justice, asked for and received the deed from him prior to February 22, 1855, and held it in his possession for E. S. Chipman, but without the knowledge or authority of E. S. Chipman. When Aughinbaugh thus received this paper he had no authority or power from E. S. Chipman to receive the delivery thereof, nor did he ever have any such authority or power. After Aughinbaugh received this paper, W. W. Chipman called upon him and asked him for it, that he might take it to get it recorded, and it was recorded at request of W. W. Chipman in the proper office on the 15th of March, 1855. This paper was delivered by W. W. Chipman to Aughinbaugh, and thereby intended by the grantor, W. W. Chipman, as a delivery to and for the use and benefit of E. S. Chipman, without condition or qualification. That afterwards, on June 3, 1855, E. S. Chipman returned from Ohio to California, and shortly afterward took the deed in his possession and made conveyances of parcels of the land described therein.

From the findings above stated in the preceding portion of this opinion, it appears that Hibberd's judgment became a lien on the land in controversy, on the 1st day of March, 1855, it having been entered and duly docketed in the proper county on that day.

It is further found that the consideration mentioned in the deed was \$5,000 and other valuable considerations, but in fact nothing was paid by E. S. Chipman to W. W. Chipman as the consideration of the conveyance, but that W. W. Chipman was at the time of making the deed indebted to E. S. Chipman.

The facts found might justify a finding that as between the two Chipmans, there was a delivery of the deed to E. S. Chipman. But do they show conclusively as a matter of law that there was a delivery as against Hibberd? Hibberd had a lien on the property as early as the 1st of March, 1855. It is found that the delivery was made to Aughinbaugh prior to March 1,

1855, for the use and benefit of E. S. Chipman, but at that time Aughinbaugh was not the agent of E. S. Chipman, who was absent and knew nothing of the paper until the 30th of June, 1855. That assent is necessary to the delivery of a deed, whether such delivery is actual or constructive, is settled law.

This is plainly declared in section 1059 of the Civil Code. In section 1054 it is provided that a grant or conveyance (see § 1053) takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor. Section 1059 of the Civil Code is in these words: "Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:—

"1. When the instrument is, by the agreement of the parties at the time of execution, understood to be delivered, and under such circumstances that the grantee is entitled to immediate delivery; or,

"2. When it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed."

It is then a valid, constructive delivery when, as in this case, it is delivered to a stranger for the benefit of the grantee, but only then when the assent is shown or may be presumed. It is contended here that the assent should be presumed, and presumed, too, as a matter of law.

The delivery founded on a presumption which is matter of fact, must be found by the court below. This court cannot find facts. It can only construe facts found, and deduce from them the proper legal conclusion. The court below has found against this presumption, and unless the deductions of law to be drawn from the facts found show a presumption of assent, this court cannot reverse the judgment of a court *a qua* on this point. As between the parties to this conveyance, this presumption, it may be conceded, might be indulged. But when can it be presumed that such assent was given by the grantee? Can it be presumed that it was given before it was known by the grantee? We cannot understand that any such presumption can be sustained. It may be that if E. S. Chipman had known of the conveyance when it was delivered to Aughinbaugh, he would have accepted it. But the question here is not, what the grantee would have done, but what was done. And there is no finding

of any assent here earlier than the 30th of June, 1855, long after Hibberd had obtained his lien by judgment. The statute (Civ. Code, § 1059) does not recognize a delivery as perfected until an assent is proved either by act or by presumption. And when reliance is placed on a presumptive assent, how can such presumptive assent be found to the delivery of a paper, until all the facts are known to the grantee. In this case there is nothing found which shows that E. S. Chipman knew any of the facts until the 30th of June, 1855. E. S. Chipman was not bound to accept this conveyance. The law does not force a man to take an estate against his will. (*Townsend v. Tickell*, 3 Barn. & Ald. 36; *Thompson v. Leach*, 2 Vent. 198.) In this last case it was held that an estate did not pass by surrender to the surrenderee until he expressly accepted it. In *Townson v. Tickell*, a devisee renounced a devise of a reversion to him, and it was held that he could do so.

It is said that the conveyance was for the benefit of E. S. Chipman, and therefore his assent must be presumed. We do not feel assured that the deed is on its face for the benefit of the grantee. It is not found that the purchase money was paid, or that the deed acknowledges the receipt of the sum (\$5,000) named as the consideration. Nor does it so appear in any other way. Under these circumstances, E. S. Chipman would be bound to the grantor for the sum named, and he might maintain an action for it, and sue out a writ of attachment and seize the property of the grantee. It is not found that the deed was made to the grantee as a payment of indebtedness. If the purchase money exceed the indebtedness of the grantor to the grantee, the amount of which is not found, then the grantee would become the debtor of the grantor for such excess. Under these circumstances, we do not think that we can hold that the deed is on its face beneficial to E. S. Chipman. And conceding that it was beneficial, are we authorized to hold an assent to the delivery as against a creditor with a lien, at a time when the grantee was entirely ignorant of the whole transaction? It would be, in our judgment, going further than is allowed by law, to hold under such circumstances that such a lien as Hibberd procured by his judgment should be displaced by a presumed assent to a transaction of which the party invoking the

presumption knew nothing until long after the lien had attached.

It may be remarked here that the delivery must be complete before the lien attached to create a superior right in Chipman. If the presumptive assent is indulged, when must such assent be held to have been given? We find no rule of law fixing the time. We know of no rule of law authorizing us to allow an assent given on being made acquainted with the facts, a retro-active operation so as to cut out and extinguish a right which attached between the signing and sealing and delivery to a stranger, and the assent given when the transaction comes to the knowledge of the grantee.

The cases cited for the most part have not in them the element of an intervening right acquired against the grantor. No such element appears in *Hastings v. Vaughn*. The same may be said of *Peavy v. Tilton*, 18 N. H. 152; *Souwerbye v. Arden*, 1 Johns. Ch. 254; *Taw v. Bury*, 2 Dyer, 167. In these cases the controversy was between grantor and grantee, or those claiming under them and standing in their places. In *Buffum v. Green*, 5 N. H. 80, 20 Am. Dec. 562, an intervening right under the levy of an attachment was set up, and the court said that if the land was attached before the deed was delivered, the claim under the attachment would prevail. In *Hulick v. Scovil*, 4 Gilm. 159, a great many cases on this subject are cited and reviewed. We refer the curious to the discussion of the cases therein contained. The learned judge, speaking for the majority of the court (two justices dissented) sums up the principles determined by the decided cases as follows:—

“I. In every deed there must necessarily be a grantor, a grantee, and a thing granted (4 Cruise, 12); that delivery by the grantor and acceptance by the grantee are essential to the validity of a deed; that a deed takes effect only from its delivery, and there can be no delivery without acceptance, either express or implied, delivery and acceptance being necessarily simultaneous and correlative acts. (*Richards v. Jackson*, 6 Cowen, 617; *Church v. Gilman*, 15 Wend. 658. Other authorities cited *post*.)

“II. Delivery may be made, *first*, to the party himself, or any other by his appointment, or to any one authorized to receive it; or *second*, to a stranger for and in behalf, and to the

use of him to whom it is made, without authority, under certain circumstances. (2 Roll, 24 l, 42; Touchstone, 57; see *post*.)

"III. In case of delivery to a stranger, without authority from the grantee to accept, the acceptance of the grantee at the time of delivery will be presumed, under the following concurring circumstances, viz.: (1) That the deed be upon its face beneficial to the grantee; (2) that the grantor part entirely with all control over the deed; (3) that the grantor (except in case of an escrow) accompany delivery by a declaration, intention, or intimation that the deed is delivered for and in behalf, and to the use of the grantee; (4) that the grantee has eventually accepted the deed and claimed under it. (4 Cruise, 34; Touchstone, 57, and other authorities *post*; 4 Gilm. 175, 176.)

The opinion shows that the last requisite mentioned where there is a delivery to a stranger, "that the grantee has eventually accepted the deed and claimed under it," must exist before the delivery is accomplished. A presumption that the grantee will accept the deed is not sufficient to establish delivery. The presumption must be that there has been an acceptance, and the facts must authorize such a presumption to complete a delivery. (See remarks in opinion reviewing *Doe ex dem. Garmons v. Knight*, 5 Barn. & C. 671, on p. 180 of 4 Gilm.) There must be delivery and acceptance before the right of another has attached. An acceptance after such right has vested is not sufficient.

The cases cited and discussed in *Hulick v. Scovil*, are as follows: *Bryan v. Wash*, 2 Gilm. 557; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Verplank v. Sterry*, 12 Johns. 546; 7 Am. Dec. 348; *Church v. Gilman*, 15 Wend. 656; 30 Am. Dec. 82; *Doe ex dem. Garmons v. Knight*, 12 Eng. C. L. 351; S. C. 5 Barn. & C. 671; *Taw v. Bury*, Dyer 161 b; *Alford v. Lea*, 3 Coke, 27; *Butler v. Baker*, 3 Coke, 26 b; *Cooke's Admr. v. Hendricks*, 4 Mon. 500; *Inlow v. Commonw.* 6 Mon. 74; *Belden v. Carter*, 4 Day, 66; 4 Am. Dec. 185; *Hatch v. Hatch*, 9 Mass. 207; 6 Am. Dec. 67; *Ruggles v. Lawson*, 13 Johns. 285; 7 Am. Dec. 375; *Wheelwright v. Wheelwright*, 2 Mass. 47; *Hedge v. Drew*, 12 Pick. 141; 22 Am. Dec. 416; *Ward v. Lewis*, 4 Pick. 518; *Powers v. Russell*, 13 Pick. 77; *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562; *Ward v. Ross*, 1 Stewt. 136; *Canning v. Pinkham*, 1 N. H. 357; *Clark v. Ray*, 1 Har. & J. 323; *Hughes v. Easten*, 4 Marsh, J. J. 572; 20 Am.

Dec. 230. The above cases are put in the opinion in a separate class from those which follow. The cases which follow, also cited and commented on, are those in which the deeds for want of acceptance by the grantee were held inoperative. (*Fay v. Richardson*, 7 Pick. 91; *Jackson v. Leek*, 12 Wend. 107; *Herbert v. Herbert*, 1 Ill. 278; 13 Am. Dec. 192; *Jackson v. Phipps*, 12 Johns. 418; *Jackson v. Dunlap*, 1 Johns. Cas. 114; 1 Am. Dec. 100; *Ferguson v. Miles*, 3 Gilm. 363; 44 Am. Dec. 702; *Jackson v. Bodle*, 20 Johns. 188; *Maynard v. Maynard*, 10 Mass. 462; *Lloyd's Lessee v. Giddings*, 7 Ohio, 418; *Elsey v. Metcalf*, 1 Denio, 326.)

Of a large number of these cases it may be said of the deeds involved in them, as was said in the opinion of the court in *Hulick v. Scovil*, that they "were voluntary deeds by parents settling property upon their minor children, and the benignity of construction given to them, has originated to no inconsiderable extent in the favor with which transactions of that character when not in fraud of creditors are always viewed." (4 Gilm. 178.) And this further remark may be made of all of them except *Buffum v. Green*, 5 N. H. 71; 20 Am. Dec. 562; *Hedge v. Drew*, 12 Pick. 141; 22 Am. Dec. 416; that they were between grantor and grantee, or those claiming under them, without the intervention of any right of a third party claiming under the grantor. And in *Buffum v. Green*, *supra*, it appeared that there had been an actual delivery to one of the grantees before the levy of the attachment on the land. (See 5 N. H. 80.) In *Hedge v. Drew*, *supra*, the assent to the deed was also before the attachment.

That the delivery of a deed to a third person for the use of the grantee is not always a delivery from a presumed acceptance has been asserted in cases of high authority; as in *Butler v. Baker*, 3 Coke 26 b., Lord Coke said: "If A make an obligation to B and deliver it to C to the use of B, this is the deed of A presently; but if C offer it to B, then B may refuse it *in pais*, and thereby the obligation will lose its force." In *Canning v. Pinkham*, 1 N. H. 357, it is said: "All that is incumbent on the grantee [this is said where delivery is to a stranger], in order to perfect delivery, is that he accept or assent to what has been done by the grantor before the latter revokes his intention to convey." What is said by Lord Coke in *Butler v. Baker* seems to be in conflict with *Taw v. Bury*, and in accordance

with what is said in *Canning v. Pinkham*. If W. W. Chipman before the assent and acceptance by E. S. Chipman had conveyed to another, the latter would have acquired the title.

As between grantor and grantee, or those claiming under them, when the right of a third person is not involved, it may be rightly held that an acceptance or assent by the grantee to a deed delivered to a stranger for the use of the grantee, made after such tradition to a stranger, constitutes a full and complete delivery. It may be so held under the doctrine of relation. The subsequent assent or acceptance relates back to the time of such delivery to the stranger and makes such acts contemporaneous, *i. e.*, makes such tradition to a stranger and the subsequent assent contemporaneous. The deed only takes effect from the delivery, and such delivery when made to a stranger for the grantee's use is only complete on acceptance by the grantee. If it is complete on delivery to the stranger, though the assent is not given until a subsequent period, it must be because by some legal rule the assent is made to relate back to the time of such delivery, and become a part of it. If the delivery is not complete until the day when assent is given, then the delivery is not accomplished until such latter date. The title then must be in the grantor until assent given, and he has perfect dominion over it until his grantee has signified his assent. The assent can get back to the date of delivery to the stranger only by virtue of the doctrine of relation, which is a fiction of law in which there is always equity, never working an injury, and which is never permitted or applied so as to do wrong to third persons. (Broom's Legal Maxims, "*In fictione juris*," etc. 128, and cases cited; *Case v. De Goes*, 3 Caines, 261; *Jackson v. Bard*, 4 Johns. 230; *Johnson v. Smith*, 2 Burr. 963; 3 Rep. 30 a; 10 Rep. 40; *Liford's Case*, 11 Rep. 51; *Mostyn v. Fabrigas*, Cowp. 177; *A. G. v. Kent*, 1 Hurl. & C. 28; 3 Blackst. Com. 43; *Goodsell v. Stinson*, 7 Blackf. 439; *Hulick v. Scovil*, 4 Gilm. 190.) A fiction of the law "is defined to be a legal assumption that a thing is true which is either not true, or which is as probably false as true; the rule on this subject being that the court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the thing." (Per Lord Mansfield, *C. J. John-*

son v. Smith, 2 Burr. 962; Broom's Legal Maxims, 128.) That a person will accept a deed beneficial to himself when delivered to a stranger for his use, is a good reason as between grantor and grantee to apply the fiction of relation. But certainly where it affects the rights of a third person, there is no sufficient ground for invoking it. The rule is well stated in *Goodsell v. Stinson*, *supra*, in the following words: "The delivery of a deed is an essential requisite to its validity, and it is from the delivery that the deed takes effect. A deed may be delivered to a third person, even a stranger, for the benefit of the grantee, and if he afterwards assent to the act, the deed will take effect from the date of its delivery, unless the rights of third persons should be affected by it. In that event the doctrine of relation would not apply, for it is a general rule that it shall not be permitted to apply so as to do wrong to strangers; as between the parties to the deed, it may be adopted for the advancement of justice." (7 Blackf. 439.)

If the factor of an intervening right existed in *Doe ex dem. Garnons v. Knight*, 5 Barn. & C. 671, it was not noticed by the court. The court discussed the points in that case as arising between grantor and grantee, or those standing in their positions. The authorities cited and commented on show this. In fact, from the remark made at the close of the opinion in that case, we infer that the court did not intend to decide this question. The remark referred to is this: "Should he [referring to the defendant] be able hereafter to show that his mortgage is entitled to a preference, the present verdict will be no bar to his claim."

We do not understand, as contended by appellant's counsel, that the court in *Hastings v. Vaughn*, 5 Cal. 315, approved of everything in *Doe v. Knight*. It only concurred with it in the point that the intention of the grantor on the issue of delivery was for the jury to decide, and that delivery is a question of fact. The remarks in the opinion that "many authorities are cited, and much good reasoning brought out in support of the position that a deed will be operative although never parted with by the person who executed it, in other words, that delivery depends more upon intention than upon the mode of fulfilling the intention," do not indicate that the court approved

all that was laid down in the cause it was referring to. But as to what is quoted above, we have this to say, that we have met with no case either in *Doe v. Knight* or elsewhere, which holds that a delivery of a deed has been held complete, where the grantor has never parted with it. As we understand the cases, the grantor must have parted with all control over the deed, to make delivery in any case, and especially when delivery is made to a stranger for a third person. (*Hulick v. Scovil*, 4 Gilm. 176.) After a complete delivery, he may retain the deed in his possession as mere custodian for the grantee; but in every other sense he has parted with it.

We find no error in the conclusion reached by the court below, that the paper purporting to be a conveyance from W. W. Chipman to E. S. Chipman was void for want of a delivery thereof, as against the title of Hibberd and the parties claiming under him.

In our view, there was no assent to or acceptance by E. S. Chipman of the paper just mentioned until the lien of the judgment in *Hibberd v. Chipman and Aughinbaugh* had attached. That being the case, the plaintiffs claiming under the judgment sale and sheriff's deed had the better right, unless for other reasons urged by appellants the sale by the sheriff and his deed did not pass to the purchaser at such sale, a title superior to that of E. S. Chipman, and of defendants claiming under him, which we will proceed to consider.

The judgment under which plaintiffs claim became a lien on the land in suit, as we have seen, on the 1st day of March, 1855. An execution in due form of law directed to the sheriff of the proper county, was issued on this judgment on the 22d day of October, 1856. This writ commanded the sheriff to satisfy the judgment named in it, in case sufficient personal property of the defendants could not be found, out of the real property in the county of Alameda belonging to defendants on the day when the judgment was docketed. This, as we have seen, was on the 1st of March, 1855. The sheriff advertised the land for sale on this execution. The sale under this advertisement was to take place on the 17th day of November, 1856. On that day it was sold, and Hibberd, who was the highest bidder therefor, became the purchaser, and afterwards regularly received the sheriff's deed.

This deed recites the writ of execution and the judgment on which it was issued, a levy under the writ on the right, title, and interest of defendants had by them on the 1st day of March, 1855, in the lands described in it, advertisement and sale of such lands on the 17th day of November, 1856, to James F. Hibberd, etc., etc.

It appears that the sheriff, in his advertisement of the sale under the writ of execution, stated that he had seized and taken under the writ all the right, etc., of the defendants in and to the lands levied on, had by them on the 1st day of March, 1856; that in the certificate of sale executed to Hibberd, after reciting the judgment, execution, and levy, the sheriff stated that he had levied on the right, etc., had by defendants on the 1st day of March, 1856; that in his return on the writ he stated the same as to the date of the levy on the right, etc., of defendants.

It is contended here by appellants that the sheriff's deed is void as to defendants, and conveys no right anterior to the right of defendants; that, conceding that such right of defendants vested on the 30th of June, 1855, that the levy of the writ having been made on the title held by W. W. Chipman and Gideon Aughinbaugh on the 1st day of October, 1856, that the title derived by plaintiffs under the sheriff's deed did not go behind that day, and was, therefore, subsequent and inferior to the title of defendants in this cause. The title of the purchaser at sheriff's sale does not depend on his return to the writ. This has been frequently held. (*Ritter v. Scannell*, 11 Cal. 238; 70 Am. Dec. 775; *Hunt v. Loucks*, 38 Cal. 382; *Blood v. Light*, 38 Cal. 653; *Wilson v. Madison*, 55 Cal. 8.) Whether the return be good or bad, sufficient or insufficient, is a matter of no moment to the purchaser, for his title in no manner depends on it. (*Ritter v. Scannell*, *supra*.) In making out his title the purchaser may use the return, if there is one which is satisfactory to him, but in no case is he required to use or introduce it, and in no case can he be prejudiced by it, whatever be its terms. It is only requisite that he show a sale, and the authority of the officer to make it. The deed shows the former, and the judgment and execution prove the latter. The law is well stated in *Blood v. Light*, by Sanderson, J., speaking for the court, as follows:—

“He is bound to see that there is a judgment which is not void, and an execution which is regular upon its face; but as to all the acts of the officer under the execution which precede the sale, he may rely upon the legal presumption that they have been duly performed; that the officer has found no personal property; that he has seized upon the land which he is about to sell; and that he has advertised the sale as required by law. (*Cloud v. El Dorado Co.* 12 Cal. 133; *Clark v. Lockwood*, 21 Cal. 224; *Moore v. Martin*, 38 Cal. 428.) The statute is directory so far as it deals with the manner in which the officer is required to execute the writ (*Smith v. Randall*, 6 Cal. 50; *Webber v. Cox*, 6 Mon. 110; *Hayden v. Dunlap*, 3 Bibb, 216), and hence, although his failure to comply with its provisions may be sufficient cause to set the sale aside, upon the application of the parties to the writ, yet it does not render the sale void. (*San Francisco v. Pizley*, 21 Cal. 59.) It is the policy of the law to uphold judicial sales, when collaterally attacked, by securing purchasers, as far as possible without prejudice to others, against risk. Such a course is to the interest of both creditors and debtors, who would be alike prejudiced by a rule which would tend to the insecurity of titles obtained in that way. It is no obstacle to this policy to require the purchaser to take the risk of the officer’s authority to sell, for that can be readily determined by an inspection of the judgment and execution under which he is acting; but to require him to ascertain and determine whether the officer has left a copy of the writ with the occupant of the land; or, if there was no occupant, that he has posted a copy upon the premises, and filed another copy, with a description of the land, with the county recorder, in case where the land stands on the records of the county in the name of the defendant in the execution; or, when it stands upon the records in the name of some other person, that he has left with such person, or his agent, a copy of the writ and a notice that the land (describing it), and any interest which the defendant has therein, has been seized under the writ, and that he has filed a copy of the writ and notice with the recorder of the county, and left another copy with the occupant of the land; or, if there was no occupant, that he has posted a copy in a conspicuous place on the land; that the judgment debtor has no personal

property; that the land is being sold in appropriate parcels; or that it is being sold according to the directions of the judgment debtor; and that it has been advertised according to law, would amount almost to an inhibition upon judicial sales, and tend greatly to the sacrifice of the land, to the prejudice of all the parties concerned. Guided by these considerations, the legislature has nowhere provided that the validity of a purchaser's title shall depend upon the manner in which the officer has performed his duty; but on the contrary, without any limitation or qualification to that effect, has provided that, 'upon a sale of real property, the purchaser shall be substituted to, and acquire all the right, title, interest, and claim of the judgment debtor thereto.'" (§ 299.) "Whether the officer has performed his duty lies between him and the parties to the writ, and the purchaser cannot be prejudiced by his remissness or neglect." (38 Cal. 654, 655.)

In the case of a sale of land by the sheriff, the title dates from the lien of the judgment as against third persons, and not from the date of any real or pretended statutory levy. (*Blood v. Light*, 38 Cal. 657.) The title acquired by the deed of the officer relates back to the date of the judgment lien, for the judgment is the source of his authority, and by such relation the last act is carried back to the first in making out the title, and takes priority as of the date of the first, which is the day of the judgment lien. (*Landes v. Brant*, 10 How. 348.) Neither E. S. Chipman nor defendants here are third persons. They stand in no more favorable position than the defendants in the judgment. They are purchasers here from one of the latter, with full opportunity to inspect the judgment from which plaintiffs deraign their title. They were bound to know and to yield to the execution and sheriff's deed. Of these they were bound to take cognizance as a legal sequence of the judgment and its lien. We cannot concur in the contention of defendants. The acts of the sheriff referred to are mere irregularities, which did not affect the title of the purchaser at the sale of the sheriff.

We find no error in the record.

The judgment should be affirmed, and it is so ordered.

ROSS, J., MYRICK, J., and MCKINSTRY, J., concurred.

[No. 8773. Department One.—September 29, 1885.]

C. H. SWIFT, ET AL., EXECUTORS, ETC., OF FRANK SWIFT, DECEASED, APPELLANTS, v. THE SAN FRANCISCO STOCK AND EXCHANGE BOARD, RESPONDENT.

UNINCORPORATED ASSOCIATION—SAN FRANCISCO STOCK AND EXCHANGE BOARD—CONSTITUTION OF CONSTRUED—DONATION UPON DEATH OF MEMBER—ACTION TO RECOVER.—The defendant is a voluntary unincorporated association. Its constitution provides in effect for the creation of a trust fund, from which, upon the death of a member, a payment of \$10,000 is directed to be made to such person or objects as he might have designated in writing, or if no written disposition was made by him, then to certain specified persons. It further provides that the payment should be deemed an absolute donation to the payee, free from all other claim or control. *Held*, that such donation formed no part of the estate of a deceased member, and that his personal representatives could maintain an action to recover it.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The facts are stated in the opinion of MR. JUSTICE MCKEE.

Estee & Boalt, for Appellants.

Garber, Thornton & Bishop, for Respondent.

MCKEE, J.—The San Francisco Stock and Exchange Board is a voluntary unincorporated association composed of one hundred persons, who under that name have combined for the purpose of facilitating the purchase and sale of stocks by its members. For that purpose the originators of the association organized in the year 1862 by subscribing to a body of rules, regulations, and provisions contained in articles of agreement in writing, which they adopted as the constitution and by-laws of the association.

Article xxii. of the constitution adopted by them contains the following provisions:—

“TRUST FUND COMMITTEE.

“There shall, at all times, exist in this board a committee composed of at least three members or more, at the discretion of the board, to be known as the Trust Fund Committee.

It shall be the duty of such committee to take charge of all moneys which may come into their hands, by direction and vote of the board, and invest the same according to their best discretion and judgment; said moneys, and the increase of the same under such investments, to constitute a trust fund, to be used and applied by such committee in the following manner, viz. :—

“Upon the death of a member of the board said Trust Fund Committee shall pay from the increase in their hands, from investment of said moneys, to such person or persons, object or objects, as may have been designated in writing by such deceased member, the sum of \$10,000 in United States gold coin. In case there be no such written disposition made, then to the widow of such deceased member, the sum of \$10,000 in United States gold coin. In case there shall be no widow, and a child or children surviving such member, then to such child or children, equally share and share alike. If there shall be neither widow, child, nor children surviving such deceased member entitled to receive said money, nor any disposition made of the same, as hereinbefore provided, then there shall be no payment or provision made under this article. The payments herein provided for shall be deemed absolute donations to the persons, or for the object to which the same are made or applied, free from all claim or control from any other source or persons.

“In case the increase of said moneys shall not have accumulated to a sum sufficient to meet the donations herein provided for as the same shall be needed, the deficit shall be made good at once by assessments *pro rata* upon the members of the board, and collected in like manner and under the same penalties as other dues.”

Of the board Frank Swift was a member from the 21st of August, 1875, until the 6th of January, 1877. As such he had fully complied with all the requirements of the constitution and by-laws, so that, in the event of his death, his surviving wife and children, or any person or object that he might designate, according to the provisions of article xxii., would be entitled to receive the donation provided by said article. And while a member of the board, he died in the city and county of San Francisco, on the 6th of January, 1877, leaving no wife, or child, or children surviving him; but he left a will which was pro-

bated, and the plaintiffs, as the executors nominated by the will, were appointed and qualified as executors thereof.

The will contained the following bequests:—

“First—I give and bequeath to my father, Chas H. Swift, the sum of \$12,500; to my mother, Adelia B. Swift, the sum of \$12,500; to my sister, Ellen A. Brown, \$5,000; to my sister, Maggie M. Mills, \$5,000; to my sister, Fannie E. Lohman, \$5,000; to my niece, Florence A. Durden, \$10,000; to my niece, Millie B. Durden, \$5,000; to my niece, Minnie F. Durden, now married to Z. T. Therrel, \$5,000. These amounts, aggregating \$60,000, I desire paid to said respective legatees within a year after my decease.

“Second—Should my estate be worth more than sixty thousand dollars (\$60,000), and I now estimate it at \$80,000, including my seat in the San Francisco Stock Exchange Board and the insurance on my life by said board, I give and devise to D. L. McDonald, of San Francisco, the brother of my late dearly beloved wife, the sum of \$5,000.

“Fifth—The balance of my estate I desire paid over to my mother, Mrs. C. H. Swift, and by her distributed among the poor in any manner she may see proper.”

After the executors had qualified and entered upon the discharge of their duties they made a demand upon the stock and exchange board for payment to them of the “donation,” to which they claimed that they as executors were entitled. At the time they made this demand there was sufficient money in the trust fund for payment; but the defendant refused to pay upon the ground that no disposition of the “donation” had been made as required by its constitution and by-laws. And seasonably after the demand and refusal, the executors commenced the action in hand to recover against the defendant a money judgment for said sum of \$10,000.

The action is founded upon the existence of a contractual relation between the San Francisco Stock and Exchange Board and its members for the payment of \$10,000 in case of the death of a member, for which it is claimed his executor or administrator may maintain an action upon section 388 of the Code of Civil Procedure. Section 388 reads thus:—

“When two or more persons associated in any business, transact such business under a common name, whether it comprise the names of such persons or not, the association may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants, and had been sued upon their joint liability.”

The personal representative of a decedent may maintain any action founded upon contract which could be maintained by the decedent if he were alive. (§ 1582, Code Civ. Proc.) But Frank Swift if alive could not maintain an action against the association of which he was a member for the recovery of the sum of \$10,000 sought to be recovered in this action, unless the members of the association were associated in a business transacted by them in the name of the association in which they contracted to pay.

The complaint affirms and the answer denies that the members were associated in business, “and transacted and carried on the business of buying and selling mining and other stocks at the city and county of San Francisco under the common name of the San Francisco Stock and Exchange Board.” Upon the issue thus joined the court finds:—

“That the defendant is not, and was not at any of the times mentioned in the complaint, an organization of persons or composed of persons who are, or at any of the times mentioned in the complaint have been associated in business, or who transact or carry on the business of buying or selling mining or other stocks, or any other business at the city and county of San Francisco or elsewhere under the common name of ‘the San Francisco Stock and Exchange Board,’ or under any other name, or at all.”

This finding is attacked as unsustained by the evidence; but it is unquestionable that the main objects of the association are, the establishment of a mart for the sale and purchase of stocks and exchange by the members for their *individual* gain or loss, and the creation of a trust fund for the benefit of surviving wife or children, etc., of deceased members; and the evidence shows that in pursuit of those objects, the association rents and fur-

nishes a hall in which the members meet at stated hours of the day, and engage in individual transactions with each other, under and in accordance with the rules and regulations adopted by them for that purpose; and that the rent of the hall, together with the incidental expenses connected therewith, are paid out of fees collected by the association for the listing of stocks and dues and fines collected from its members; but these things are done merely for the convenience of the members, and as incidental to the primary objects of the association. (*Lafond v. Deems*, 81 N. Y. 507.)

The collection of these fees, fines, or dues does not constitute a business in which the members participate in the way of profit or loss as partners or otherwise; and when collected they do not constitute property in which the members have a right to any proportional part of it. "The association is, therefore, not a partnership; it does not share in the losses of the individual associates; each member takes his own gains and incidentally sustains the losses incident to his engagement. . . . There are no profits earned to be divided among its members, nor are there any losses to be borne arising out of the acts of the joint body. . . . The association looks to a continued existence unaffected by the death, resignation, suspension, or removal of its members. If it was a copartnership, the retirement or death of one of its members would *ipso facto* dissolve it." (*White v. Brownell*, 3 Abb. Pr. N. S. 323.)

"Nor do the members as stockholders hold any interest in the property derived from the collection of fees, dues, or fines. Such property is a mere incident and not the main purpose or object of the association. A member has no severable proprietary interest in it, or a right to any proportional part of it upon his withdrawal, removal, or death." (*Dos Pasos on Stock Exchange*, p. 15.)

And the bond of association contained in the articles of agreement contains nothing which binds the members in the associate name to pay a sum of money to any member, or to do any act or thing from which a promise to pay a sum of money to any member or members *in personam* would be implied. In other words, there is no promise express or implied by the members, collectively or individually, in the name of the association, out

of which springs a personal obligation in favor of any member, for a breach of which an action would be maintainable against the association by a member in his lifetime, or by his personal representative after his death.

But it is urged that the association transacted the business of life insurance of its members, because section 23 of the constitution, as amended in 1875, required a candidate for the benefit of the trust fund to file with the secretary of the board a medical certificate attesting his fitness, to be accepted by the board, as a participant in the "life insurance fund"; and it is argued from this article, that the members of the association are associated in the business of life insurance and transact such business in the common name of the association.

Reading together sections 22 and 23 of the constitution we find nothing which justifies the conclusion that the association, in connection with the fund in controversy, is engaged in transacting an insurance business. There is no contract of insurance between the members. The constitution merely provides for a beneficiary fund, and for the payment, out of the fund, of a specified sum to the surviving or designated person or persons qualified to receive it upon the death of a member. The term "life insurance" does not apply to such an object. (*Barboro v. Occidental Grove*, 4 Mo. App. 429.) So in *Durian v. Central Verein etc.*, 7 Daly, 168, it was held that where a beneficial society by its constitution provides for the payment of a specified sum to the wife upon the husband's death, such right is not in the nature of an insurance upon the husband's life, and the society may, by a subsequent change in its constitution or by-laws, make the money payable to some nominee of the husband other than the wife.

And in distinguishing between an association, whose primary object was contracting with its members for the insurance of their lives, and an association organized for a social, literary, or benevolent purpose, to which a feature of mutual insurance is added for the purpose of mutual aid, the Supreme Court of Missouri hold that the latter cannot be said "to be carrying on the business of insurance, and with which we suppose it was not the intention of the legislature to interfere." (*State ex rel etc. Benefit Association*, 6 Mo. App. 172. See also *Lafond v. Deems, supra.*)

I therefore think that the acts performed by the association in carrying out the purposes for which it was established, are not done in the transaction of a business carried on in the name of the association for the profit or loss of its members. It rents rooms, employs officers, fixes fees and dues, imposes fines, and collects them; and when the retirement or death of a member renders it necessary to elect a successor by the sale of his place in the board, or to levy an assessment for the purpose of making payment out of the trust fund of the donation provided by the constitution to the surviving members of the family or designated appointee of the deceased member, it sells the one and enforces the collection of the other from the members "in like manner and under the same penalties as other dues." But all these things, although in the nature of business, do not in themselves constitute a business for the transaction of which the members have associated themselves in the name of the association. They are merely incidental to the primary objects of the association.

Yet while no contractual obligations *in personam* bound the members of the association as partners or otherwise, for transacting a business in the common name of the association for their profit or loss, there spring from the articles of agreement obligations incidental to the creation of rights for the benefit of others, and of duties imposed upon the association in connection with the fund provided for such rights, in the event of the death of any one of the members. These are rights which arise out of the executory contract between the association and the members in favor of surviving members of the family of a deceased member, or the persons or objects designated by him, before his decease, according to the provisions of the constitution, as beneficiaries of the trust. If such surviving or designated beneficiaries exist upon the death of a member the rights to the beneficiary fund vest in them, and the corresponding duty is imposed upon the association to pay to them out of the fund the sum agreed to be paid. But the articles of agreement provide that such payments "shall be deemed absolute donations to the persons, or for the object to which the same are made or applied, free from all claim or control from any other source or person."

The beneficiaries are, therefore, the only persons qualified to receive a "donation" out of the fund; it does not belong to the estate of the deceased member and is not chargeable with the payment of his debts.

So, in an action brought to determine the right to a beneficiary fund, payable by an association, upon the death of one of its members, under a constitution which provided, "that on the death of a member in good standing a beneficiary fund shall be paid 'to the person or persons named by the decedent and entered by his order on the will-book,'" the Supreme Court of Michigan held, that the fund payable on the death of a member of the association to persons named by him is not to be treated as part of his estate subject to his debts, and does not go to the administrator, but should be paid directly to the beneficiaries. (*The C. M. Benefit Association v. Priest et al.* 46 Mich. 429.) To the same effect will be found *Ballou v. Gile, Administrator etc.* 50 Wis. 614; *Vollman's Appeal*, 92 Pa. St. 50; *Masonic Mutual Life Ins. Co. v. Miller, Administrator*, 13 Bush, 489; *Arthur v. Odd Fellows*, 29 Ohio St. 557.

As, therefore, the beneficiary fund of the association was no part of the estate of one of its deceased members, but belonged to the surviving or designated donees of the fund, it follows the testator had no interest in it upon which a will could operate; and the executors are not entitled to recover it as part of the estate of their testator.

Yet while the testator had no personally enforceable right or interest in the fund itself, he had, under the constitution of the association, a power of appointment—authority to designate the ultimate beneficiary. But that was a power exercisable by him, and if not exercised prior to his death the power and authority died with him. Nobody representing him could exercise it after his death. If, upon his death, there were no survivors and no persons or objects designated to take, he had nothing in the fund which would descend, or upon which his will could operate. "His contract," says the Supreme Court of New York, "effected that result. . . . The condition of payment to which he agreed was that the money should be paid out of the fund to the person designated by him before his decease." (*Hellenberg v. Dist. No. 1 of I. O. of B. B.* 94 N. Y. 585, 586.)

It may be conceded that a member of the association, in the exercise of this power of appointment, could designate his administrator or the executors of his will, or any person or objects, as the recipients of his bounty; and the question arises whether the testator, by his will, designated the executors as beneficiaries of the trust fund. The court finds:—

“Said Frank Swift did not, in or by his last will and testament, or otherwise, or at all, designate any person or persons, or any object or objects, to whom or to which the sum of ten thousand (\$10,000) dollars, or any part thereof, mentioned in and provided for by article xxii. of constitution of said association, should be paid. That . . . he did not, in or by said last will and testament, or otherwise, designate said sum of ten thousand (\$10,000) dollars, or any part thereof, as included in or belonging to the estate of which by said will he was making testamentary disposition.”

This finding is also attacked as unsustained by the evidence.

The question of designation must be determined by the will itself, for it is the only evidence in the case of an exercise of the power of appointment. In the will the testator makes no mention of the trust fund, except incidentally, in connection with an estimate of the value of his estate. After making specific bequests to the amount of \$60,000, he adds: “Should my estate be worth more than \$60,000 (and I now estimate it at \$80,000, including my seat in the San Francisco Stock and Exchange Board and the insurance on my life by said board), I give, bequeath, etc. . . . And the balance of my estate I desire paid over to my mother . . . and by her distributed among the poor in any manner she may see proper.”

It might well be inferred from this language that the testator intended to mix what he supposed to be his interest in the trust fund of the board with his estate, for the purpose of exercising over it, as part of his estate, his disposing power. But, as we have seen, he had no disposing power over it as part of his estate. The only power exercisable over it was that defined by the constitution of the board, and that was merely a power of appointment of some person or body to receive it as a thing distinct and separate from his estate. Undoubtedly the testator might have exercised this power of appointment of a person to

receive the fund and apply it to the purposes of his estate in his will, and he could have designated in that way his executors or any other persons; but the will does not name the executors, or creditors, or legatees, jointly or individually, as persons to receive payment of the "donation" for the purposes of his estate or otherwise. And for aught that appears in the case itself the estate of the testator is sufficient to meet all the special bequests of the will. That being so, the beneficiary fund did not pass either by the special bequests or the residuary clause of the will as part of the estate of the testator, and the will itself did not operate as a valid execution of the power of appointment.

In the case of the *Maryland Mutual Benevolent Society of the Imperial Order of Red Men of the State of Maryland v. Clendinen, Administrator with the will annexed of Ferdinand Stansbury*, 44 Md. 429, the testator, at the time of his death, was a member in good standing of an incorporated benevolent society, which by its constitution provided, upon the death of any member, for the payment of a fixed sum "to the widow, child, children, or such person or persons to whom the deceased may have disposed of the same by will or assignment." The testator left neither widow nor children, but by his will he bequeathed as follows: "After the payment of all my just debts and funeral expenses out of my estate, I devise as follows: I give and bequeath the entire residue of my estate to my three sisters," etc. The administrator claimed that the money passed by the will, and that he was entitled to recover it as assets of the estate; but the court held that the fund assigned by the charter to the widow and children of the deceased or his legatee or assignee was not assets recoverable by the administrator; that the *jus disponendi* given by the charter was a mere power; and that the will was not a valid exercise of the power, the intention to exercise it not being expressed, and it not appearing that there was no other estate upon which it might operate.

In default of appointment the trustees of the fund would not be justified to pay. By the articles of agreement they were bound to pay to the surviving members of the family entitled to payment, or to the person or object designated for that purpose. The contract was to pay to no one else; and if there were no

survivors to take, and no persons or objects designated, the trustees were not bound to pay at all.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurring.—We concur in the judgment on the ground that the executors of the deceased Swift cannot sustain the action. Whether or not any other person or persons can do so, it is not necessary, we think, to decide. That the donation in question formed no part of the estate of the deceased cannot be doubted, and that the rights of the plaintiffs as executors are limited to the estate of their testate seems to us equally clear.

[No. 9765. Department Two.—September 29, 1885.]

LOWER KINGS RIVER WATER DITCH COMPANY,
RESPONDENT, v. KINGS RIVER AND FRESNO CANAL
COMPANY, APPELLANT.

PRACTICE—AMENDMENT OF PLEADINGS—DISCRETION OF THE COURT.—

After the cause had been at issue more than two years, the defendant, without obtaining leave of the court and without notice to the plaintiff, filed an amended answer, a copy of which was served upon the plaintiff's attorneys, who made no protest or objection until after the trial had commenced, two weeks subsequent to the service and filing of the amended answer, when they moved to have it stricken from the files. The court granted the motion, and the defendant thereupon asked leave to refile the amended answer on a proper showing, which the court refused. *Held*, that the action of the court was an abuse of discretion.

APPEAL from a judgment of the Superior Court of the County of Tulare, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

H. S. Dixon, and *D. S. Terry*, for Appellant.

Any objection to the filing of the amended answer was waived. (*Hollister v. Livingston*, 9 How. Pr. 140, and other cases.) It was the duty of the court to allow the amendment. (*Peters v. Foss*, 16 Cal. 358; *Lestrade v. Barth*, 17 Cal. 286; *McMillan v. Dana*, 18 Cal. 349; *Roland v. Kreyenhagen*, 18 Cal. 457; *Person v. McCahill*, 22 Cal. 127; *Kirstein v. Madden*, 38 Cal.

163; *Stringer v. Davis*, 30 Cal. 318; *Lybecker v. Murray*, 58 Cal. 186.

Brown & Daggett, for Respondent, cited *Stuart v. Lander*, 16 Cal. 373; *Page v. Williams*, 54 Cal. 562; *Harney v. Corcoran*, 60 Cal. 316.

MYRICK, J. — This is an action to recover damages for an alleged improper diversion of water from Kings River, and for an injunction restraining further diversion. The complaint was filed April 23, 1880, and on the 6th of September an answer was filed. In October of the same year an appeal was taken from an order refusing to change the place of trial, and the appeal was in this court until May 22, 1882, when the remittitur went down. On the 4th of September, 1882, without previous notice to the defendant, plaintiff obtained an order of the court setting the case down for trial on the 6th of October. Negotiations for a compromise and settlement had been pending between the parties and were undetermined when the last order was made. On the 23d of September the defendant, without obtaining leave of the court and without notice, filed an amended answer, setting up among other defenses not contained in the original answer, prior appropriation by defendant and those under whom it claimed. A copy of the amended answer was delivered to and received by plaintiff's attorneys without objection and without protest. No notice was given that the defendant would apply for leave to file the amended answer. On the 6th of October the case was called for trial. The plaintiff asked a postponement until the following day, because certain depositions had not been returned. Defendant objected to the postponement unless the testimony of a witness who did not wish to be detained could be taken. The parties consented to the examination of the witness, which was had and further hearing postponed. On the following day, October 7th, the case was called for trial and answered "ready" by both parties. Before further proceeding, the plaintiff moved to strike from the files the answer of September 23d, because it had been filed without leave, and because no notice had been given. The court granted the motion against defendant's protest and exception. The defendant then asked

leave to file the amended answer, presenting affidavits to show why the new defenses set up had not been presented in the original answer. The plaintiff objected on the ground that no notice of the application had been given. The motion was denied. Defendant then asked a postponement that he might prepare and file additional affidavits, which was also denied. The court then took a noon recess, and after recess the defendant read an additional affidavit and renewed his motion for leave to refile the amended answer. This motion was denied. The trial then proceeded. The plaintiff gave evidence tending to show that its appropriation commenced in the latter part of 1870. The defendant offered to show that its predecessors' acts of appropriation commenced in July, 1870, and thus that defendant's rights antedated plaintiff's claim of right. This evidence was excluded. The defendant made a further effort during the trial to amend its answer so as to admit evidence of prior appropriation.

We are not prepared to say the court erred in excluding the evidence offered, for the reason that it was not within the issue; but we think the defendant should have been permitted to make its defense. As between the parties to this controversy, one party or the other has the better right. The allowance of amendments to pleadings is in general largely in the discretion of the trial court, but we think the record of the testimony given and offered and rejected, shows that such discretion was not properly exercised in this case. In strictness under the pleadings, it may be that plaintiff has the better right; but if the defendant can show the matters set forth in its proposed amended answer, it may be that the defendant has the better right.

We do not hold that the defendant had the right, without notice and without leave, to file its answer of September 23d; but we think the circumstance that plaintiff's attorney received a copy without objection and without protest, negotiations for a settlement and compromise having been pending, might well have led defendant's attorneys to suppose the amended answer would be suffered to remain without objection. Not until after the trial had actually commenced (one witness having been examined) was this supposition dispelled; and at that time they found themselves engaged in a trial in which they could not

stand even-handed with their opponents. The object of judicial proceedings is to discover all the facts of a case and apply the law; and the theory of the Code is that the parties should each have reasonable opportunity to present his side of the case. We think the defendant has not had such opportunity in this case.

Judgment and order reversed and cause remanded, with directions to permit the defendant to file its amended answer.

MORRISON, C. J., and THORNTON, J., concurred.

Hearing in Bank denied.

[No. 11122. Department Two.—October 3, 1885.]

J. A. CARIT, RESPONDENT, v. WILLIAM WILLIAMS
ET AL., ANDREW CHARLES, PETITIONER.

APPEAL—ORDER MADE AFTER JUDGMENT—STAY OF EXECUTION.—Pending an appeal from an order made after final judgment for the payment of money, the undertaking on appeal from the order having been waived, but no appeal having been taken from the judgment, the Supreme Court has no authority to grant a stay of execution upon the judgment.

APPLICATION for an order staying execution upon a judgment of the Superior Court of the city and county of San Francisco.

The facts are stated in the opinion of the court.

Cook & Cook, for Petitioner.

D. H. Whittemore, for Respondent.

THORNTON, J.—This is a motion by Charles above named for a stay of execution upon a judgment recovered against him and another.

After the recovery of the judgment Charles made an application for a discharge from his debts under the insolvent laws of the State, which was granted. In the schedule filed in the

proceedings in insolvency, the judgment above mentioned was placed. After the procurement of the discharge of Charles an execution was issued on the judgment, which came into the hands of the sheriff. The petitioner Charles, after the issuance of the execution mentioned above, filed among the papers in the action above entitled, a certified copy of his discharge in insolvency, and subsequently on the 31st of May, 1884, gave notice of a motion for the 6th day of June, 1884, to set aside the execution before mentioned, to stay perpetually the issuance of any execution on said judgment against petitioner Charles, and ordering that the judgment as against the petitioner be marked satisfied and discharged. This motion was based on the discharge in insolvency of the petitioner. This motion was afterwards heard and denied. From this order an appeal was subsequently prosecuted to this court. It appears that the undertaking on appeal for \$300 has been waived according to law.

On the foregoing facts, the motion by Charles in this court for a stay of execution on the judgment aforesaid is based.

We see no reason why this motion should be granted. The waiver of the undertaking is sufficient to stay any execution of the order appealed from, were any stay necessary. But it is manifestly insufficient to stay execution on the judgment referred to even if any such stay could be granted on an appeal from an order made after the judgment. This court has no authority under the statute for ordering any such stay. The stay of execution on a judgment for the payment of money is only allowed on an appeal from the judgment, and giving the undertaking in double the amount, etc., as required by the statute. (Code Civ. Proc. § 942.) Section 949 of the Code of Civil Procedure only refers to a stay of execution upon the order or judgment appealed from, in cases not provided for in sections 942, 943, 944, and 945. In this case there is no appeal from a judgment; the appeal is from an order made after the final judgment, denying Charles' motion for an order, on which no stay is requisite. We think it clear that this court has no power under the statute to grant the stay asked for.

The court sees no reason why, if the order prayed for here were within its discretionary powers, that it should be granted. It certainly would not be granted without requiring the amplest security for the satisfaction of the judgment.

The application must be dismissed, and it is so ordered.

MYRICK, J., and MCKINSTRY, J., concurred.

[No. 7790. In Bank.—October 9, 1885.]

PIERRE PELLIER, RESPONDENT, v. T. J. GILLESPIE
ET AL. SAN JOSE INDEPENDENT MILL AND LUM-
BER COMPANY, APPELLANT.

PRACTICE—SERVICE OF SUMMONS—RESIDENCE OF DEFENDANTS.—An affidavit which shows that the summons was served on the defendants in the same county, and that a copy of the complaint was served on one of them, need not state that all the defendants were residents of the county.

MORTGAGE—FORECLOSURE—PERSONAL JUDGMENT.—In an action to foreclose a mortgage, an allegation in the complaint that the grantee of the mortgaged premises at the time of his purchase covenanted and agreed to pay the mortgage debt, and discharge the mortgage lien, is sufficient to sustain a personal judgment against such grantee for the deficiency.

ID.—DESCRIPTION OF PROPERTY.—The description of the property in the mortgage and decree examined, and *held* sufficient.

APPEAL from a judgment of the Superior Court of the County of Santa Clara.

This was an action to foreclose a mortgage executed by the defendant Gillespie, who subsequently conveyed the property to the appellant subject to the mortgage. The affidavit of service shows that the summons was served on all the defendants in the county of Santa Clara, and that a copy of the complaint was served on defendant Gillespie. On default of the defendants a decree was rendered that the mortgaged property be sold to satisfy the mortgage, and that a judgment for any deficiency be docketed against the appellant. The remaining facts sufficiently appear in the opinion of the court.

Houghton & Reynolds, for Appellant.

James R. Lowe, and Rhodes & Barstow, for Respondent.

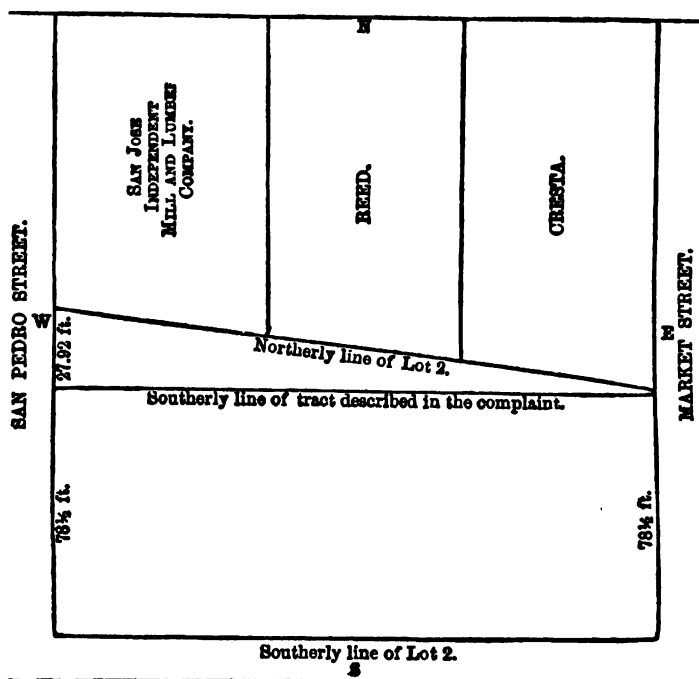
MYRICK, J.—When this cause was before the court in department, an opinion was filed as follows:—

“The objection that the affidavit of service of summons is fatally defective, because it does not state that the appellant on whom the summons alone was served, and the defendant on whom a copy of the complaint was served with the summons, were residents of the same county, is overruled, on the authority of *Calderwood v. Brooks*, 28 Cal. 153. The allegation that appellant covenanted and agreed to pay the mortgage debt and discharge the mortgage lien is sufficient to sustain the judgment. There is a sufficient description of the premises.”

After hearing by the court in Bank, we see no cause for changing the views expressed in department. We will, however, add, as to the sufficiency of the description of the premises, that all reference to lot 2 and map may be omitted, and a description be found. Let the description as found in the mortgage and decree be slightly transposed (lines and distances given as stated), and the description may read thus: “Beginning at a point on the easterly line of San Pedro Street 27 92–100 feet southerly from a point where the southerly line of the lands of the San Jose Independent Mill and Lumber Company strikes said easterly line of San Pedro Street, and running from said point at right angles with said street to the westerly line of Market Street; thence along the line of lands of Cresta, Reed, and San Jose Independent Mill and Lumber Company to said line of San Pedro Street; and thence along said line of San Pedro Street, southerly 27 92–100 feet to place of beginning.” Can we say this description embraces no land, and the sheriff could place no one in possession of any premises? Can we say the line back from Market Street is on the same line approaching Market Street? We think not. The judgment is affirmed.

MORRISON, C. J., MCKEE, J., and THORNTON, J., concurred.

MCKINSTRY, J., concurring.—I concur in the judgment. The mortgage and decree contain a good description.



Treading the contract of the defendant, the San Jose Independent Mill and Lumber Company, as in equity, and in view of section 726 of the Code of Civil Procedure, a contract to indemnify the mortgagor against the payment of any deficiency that might arise under a foreclosure and sale, it was an agreement of the benefits of which the mortgagee could avail himself upon the principle of subrogation. (*Bridgel v. Brizzolara*, 64 Cal. 354.)

I agree the affidavit of service was sufficient.

Ross, J., concurred

Rehearing denied.

[Nos. 9560; 9735. In Bank.—October 9, 1885.]

IN THE MATTER OF THE ESTATE OF NICHOLAS
SKERRETT, DECEASED.

WILL—DEED OF GIFT.—An instrument purporting to be a deed of gift, but inoperative for want of delivery, cannot, in the absence of proper evidence that a testamentary disposition was intended, be admitted to probate as a will.

ID.—CERTAIN INSTRUMENTS CONSTRUED AS A WILL.—Two instruments in the handwriting of the deceased, attached together, and found among his papers, one being in the form of a letter signed by him and addressed to his sister, and the other purporting to be a copy of a deed of gift from the former to the latter, and it appearing on the face of the letter that the property described in the deed was intended by the deceased as a provision for the sister after his death, *held*, to be a will, and admissible to probate.

APPEALS from certain orders of the Superior Court of the city and county of San Francisco.

The testator died August 13th, 1883. The remaining facts are stated in the opinion of the court.

A. H. Loughborough, for Anna J. Skerrett, Proponent.

Joseph Hutchinson, Winans & Belknap, Lloyd & Wood, P. G. Murphy, and *M. C. Hassett*, for Contestants.

The letter was not a will. (1 Jarman on Wills, Am. notes, 26; *Succession of Hampton Elliott*, 27 La. An. 44; *McBride v. McBride*, 26 Gratt. 481; *Crutcher v. Crutcher*, 11 Humph. 386; *McGee v. McCants*, 1 McCord, 577.) The deed was not testamentary in its character, and was not executed as a will. (*Wall's Administrator v. Ward*, 2 Swan, 648; *Swails v. Bushart*, 2 Head, 561; *Matter of Diez*, 50 N. Y. 93; *Wall v. Wall*, 30 Mo. 94; 64 Am. Dec. 197; *Bass v. Bass*, 52 Ga. 531; *Edwards v. Smith*, 35 Miss. 198; *Golding v. Golding's Administrator*, 24 Ala. 122.)

MYRICK, J. — These appeals will be considered together. No. 9560 is an appeal from an order refusing to admit an instrument to probate as the will of the deceased; and No. 9735 is an appeal from an order admitting an instrument to probate.

The following appears in the bill of exceptions in appeal No. 9560:—

“Be it remembered that on the 13th day of September, 1883,

there was filed with the clerk of said Superior Court a certain instrument in writing, which was in words and figures following, to wit:—

“This indenture made this twenty-sixth day of April, one thousand eight hundred and eighty-one, between Nicholas Skerrett, of the city and county of San Francisco, State of California, party of the first part, and Anna J. Skerrett, his sister, of London, England, party of the second part:—

“*Witnesseth*: That the said party of the first art, in consideration of the love and affection which the said party of the first part has and bears unto the said party of the second part, does by these presents give, grant, and confirm unto the said party of the second part, and to her heirs and assigns forever, that certain lot [here follows description of real estate], together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainder, and remainders, rents, issues, and profits thereof, to have and to hold all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to her heirs and assigns forever.

“In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

“MY DEAR ANNA:—I have for a long time been thinking of executing this document. We all know life is uncertain, and we don't know the moment we may be called away. Both you and myself may live for many years to come, yet we know not the time. I therefore want you to know you are provided for under any circumstances. Now, I want to explain the particulars: This deed which I send you a copy of is all regularly made out and witnessed before a notary public. Nothing else necessary but to have it recorded; then it becomes your property, which can be done any moment, if necessary. My intention, however, is to provide for you while I live, the same as I always have done; and hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live. I must now conclude, having no more to say, and are joined by Mr. Dixon in wishing you health and happiness. Your affectionate bro.,
N. SKERRETT.”

A witness testified as follows:—

“After Mr. Skerrett’s death, myself and Capt. Lees examined his box, in which his deed and other valuable papers were consigned, to discover whether there was any other will than the one produced here. I did not see anything that had reference to that except that, and I found no paper purporting to be a will. I found in the drawer of his desk an envelope addressed to his sister Anna, containing a letter and copy of deed to her. I found in the tin box before mentioned, in the lower part of the same desk, a deed from him to her acknowledged before a notary. This deed was in an envelope, indorsed in the handwriting of Nicholas Skerrett, ‘Deed of Gift, Nicholas Skerrett to Anna Skerrett.’ Neither of these envelopes was sealed. [The witness is here shown the said instrument which was filed herein for probate, as aforesaid.] This is the paper which I found in the drawer of Mr. Skerrett’s desk, inclosed in an envelope, addressed to his sister Anna. I have often seen him write and I know his handwriting. The whole of this instrument is in the handwriting of Nicholas Skerrett, and it is his signature subscribed at the end. The address on the envelope was also written by him.”

It was also in evidence that the sister referred to, Anna J., was in indigent circumstances, and that the deceased had made remittances to her for her support. The deed of gift which was referred to was executed (except as to delivery) and was acknowledged; it was not delivered, but was found in a box of the deceased. A witness testified that he suggested to the deceased that he should send the deed to the sister, to which deceased replied: “Well, you know she will have it, and you know she will have abundance.”

The court found that the instrument (copy of deed and letter) was entirely written and signed by the hand of the deceased; that it was not dated, and was not a will; therefore, the court refused its probate.

In the case presented in the appeal, No. 9735, the deed itself, acknowledged as a deed and witnessed (not the copy and letter), was offered for probate. The court found its execution by the deceased, in the presence of the two witnesses; that he declared the same to them to be his will; that they signed the same in

his presence and at his request; and admitted the same to probate.

We are of opinion that the order in each case was erroneous. The deed (proposed in No. 9735) was a deed of gift, and contained no words of testamentary character. It was invalid as a deed, because not delivered; it was not a will, because it expressed no design to be other than a deed. The evidence was insufficient to show its execution as a will; it was not olographic, and the evidence was insufficient to show that the deceased declared to the witnesses that the paper was his will. The instrument proposed in No. 9560, taken as an entirety, should have been admitted. It was written entirely by the hand of the deceased, it was signed by him, and a date appears at the commencement. Neither the copy of the deed nor the letter, taken by itself, constitute a will; the one is not testamentary in its character, the other has no date; but taking them together as the deceased left them, forming one document, it is complete. The first part furnishes the date, and the latter the testamentary character. We think the following words clearly show an *animus testandi*, viz.: "We all know life is uncertain, and we don't know the moment we may be called away. . . . I therefore want you to know you are provided for under any circumstances. . . . My intention is to provide for you while I live, the same as I have always done; and hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live."

Doubtless the deceased had it in his mind, when he executed the deed, to send it to his sister at some time, thus vesting the title in her in his lifetime; but for some reason he retained it, perhaps so that he could sell the property if he should desire, but that he intended she should have the property upon his death, if not sold by him, is to us very clear. Such being the case, and the instrument being executed with the formalities required by law, it is entitled to be admitted to probate.

The orders and motions in both appeals are reversed and the matters are remanded with directions to the court below to refuse probate of the deed by itself, and to admit to probate the copy of deed and letter, being the instrument referred to as proposed in appeal No. 9560.

MORRISON, C. J., MCKEE, J., THORNTON, J., and MCKINSTRY, J., concurred.

Rehearing denied.

[No. 5214. Department Two.—October 22, 1885.]

J. H. CARPENTER, APPELLANT, v. A. HEWEL,
RESPONDENT.

NEW TRIAL—NOTICE OF INTENTION—TIME OF FILING—NOTICE OF DECISION—STATEMENT—APPEAL.—An appeal from an order refusing a new trial will not be dismissed on the ground that the notice of intention was not filed in time, where the record fails to show that notice of the decision was served on the appellant or his attorney, and no objection was made by the respondent in the lower court to the settlement of the statement on the motion.

PLEADING—COUNTER-CLAIM.—A counter-claim must be denominated as such in the answer in order to be effective.

ID.—EJECTMENT—USE AND OCCUPATION—RENT.—In an action of ejectment, the defendant, after denying the ownership of the plaintiff, and averring title in himself, set up a lease of the premises in controversy by himself to the plaintiff, and an indebtedness by the latter for rent accruing under the lease. *Held*, that such indebtedness could not be pleaded as a counter-claim.

APPEAL from a judgment of the Superior Court of Stanislaus County, and from an order refusing a new trial.

The facts are stated in the opinion.

Schell & Bond, for Appellant.

The cause of action set up by the defendant did not constitute a counter-claim. (Code Civ. Proc. § 438; Pomeroy on Remedies, §§ 775, 794; *Edgerton v. Page*, 20 N. Y. 281; *Hancock Ditch Co. v. Bradford*, 13 Cal. 638; *Brown v. Harter*, 18 Cal. 77; *Moyle v. Porter*, 51 Cal. 639; *James v. Canter*, 53 Cal. 31; *Brannan v. Paty*, 58 Cal. 331.)

W. E. Turner, for Respondent.

FOOTE, C.—The plaintiff Carpenter brought an action of ejectment for the possession of some land. He alleged an unlawful entry upon the same by the defendant, and his own ouster therefrom, claimed restitution of the premises, and

damages for its withholding, and for rents, issues, and profits. The defendant answered denying the allegations of the complaint.

And further answering, averred himself to be the owner of the premises and entitled to the possession thereof; alleged a contract by which the plaintiff became his tenant, and claiming thereunder rent for the use and occupation, prayed judgment for the same in the sum of \$1,000.

The plaintiff on the 27th of May, 1880, moved the court to dismiss "this action without prejudice." The court refused to dismiss the action. Judgment was afterward rendered in favor of the defendant for the amount claimed. The plaintiff's motion for a new trial was overruled, and from the order made therein and the judgment he appealed.

Respondent claims the appeal should be dismissed, because notice of intention to move for a new trial was not filed in time, under section 659 of the Code of Civil Procedure.

Twelve days had elapsed from that on which the decision in the case made, before the filing of that notice. But nowhere in the record does it appear that any notice of the decision in the case was ever served on the plaintiff or his attorney. And no objection was made in the court below, by the defendant, to the settlement of the statement on said motion.

The defendant pleading, averring title in himself, and the attornment of the plaintiff as his tenant, and praying for judgment of \$1,000, for his use and occupation of the premises, was nowhere therein "denominated a counter-claim."

This should have been done to make it effective as such. (§ 581, Code Civ. Proc.; *Brannan v. Paty*, 58 Cal. 330, 334.)

But even had it been so denominated, it would not have constituted a counter-claim.

The matters alleged therein did not arise out of the transaction, and were not connected with the subject of the action, according to the construction which this and other courts have given as proper to be placed on language such as that contained in section 438 of the Code of Civil Procedure, subdivision 1. (*Moyle v. Porter*, 51 Cal. 639, 640; *James v. Center*, 53 Cal. 31; *Pomeroy on Remedies*, § 775; *Bliss on Code Pleading*, § 375, and cases cited.)

The judgment and order should be reversed, cause remanded, and the court below directed to permit the plaintiff to dismiss his action, on payment of costs and disbursements accruing up to the date of the order refusing to dismiss the same.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded, with directions to permit plaintiff to dismiss his action, on payment of costs and disbursements accruing up to the date of the order refusing to dismiss the same.

[No. 8876. Department Two.—October 22, 1885.]

THOMAS MEADE, APPELLANT, v. MARTIN WATSON,
RESPONDENT.

FENCES—ACTS IN RELATION THERETO.—The Acts of April 27, 1855, and April 3, 1860, concerning lawful fences, are continued in force under section 19 of the Political Code, and consequently the counties to which they apply are not subject to the provisions of section 841 of the Civil Code.

ID.—WHAT CONSTITUTES.—A fence which is good, strong, substantial, and built of stone, forming a perfect enclosure, and sufficient to turn stock, is a lawful fence within the meaning of the statute, although it is not specifically described therein.

ID.—DIVISION FENCE.—The line or division fences provided for by the statute of 1860 must be lawful fences.

ID.—In an action brought under the statute to recover one half the value of a partition fence, and to foreclose a lien therefor, it is not necessary for the plaintiff to show that other fences which have been adopted by the defendant in completing his enclosure are lawful fences.

ROAD LAWS—CONSTITUTION.—The road laws retained by the Code having been in force before the adoption of the present Constitution, are not affected by the provision against special legislation.

APPEAL from a judgment of the Superior Court of the county of Stanislaus.

The facts are stated in the opinion.

Wright & Hazen, for Appellant.

W. E. Turner, for Respondent.

SEARLS, C. — This is an action to recover the sum of \$280,

with interest and counsel fees, and to foreclose a lien for one half the value of a partition fence.

The appeal is from a judgment in favor of defendant, on a demurrer to the complaint.

In addition to his general demurrer, defendant sets forth as special causes why the complaint is not sufficient, that the fence alleged to have been constructed by plaintiff is not one of the kinds of fence declared to be a lawful fence by the act of the legislature of the State of California, entitled "an act concerning lawful fences," approved April 27, 1855, and the acts supplementary thereto.

B. That there is no allegation in said complaint that the fence erected by plaintiff is as strong, substantial, and as well calculated to protect enclosures as either of the kinds of fence, by the said act declared a lawful fence.

C. That it appears that neither of the fences described in the complaint is a lawful fence within the meaning of the aforesaid act of the legislature.

The allegations of the complaint essential to a decision on the demurrer are, that the plaintiff and defendant are adjoining land-owners, that plaintiff erected upon the line between his land and that of defendant, a good, strong, substantial, and lawful stone fence, three and one half feet high, two feet wide at the base and one foot wide at the top, compact and regular in construction, etc. The complaint then proceeds to aver that certain other coterminous land-owners erected fences, which together with his and certain fences erected by defendant, served to "and did and now does form a perfect and sufficient enclosure of all said premises, and sufficient to, and the same and the whole thereof did, and now does, prevent the ingress of stock upon, or the egress of stock from said premises and the whole thereof."

The land of defendant thus enclosed is not divided by a partition fence from that of Abbott, Shoemaker, and Tuck, adjoining land-owners, but is enclosed in one common enclosure with their land.

The land in question is situated in the county of Stanislaus, and is therefore in one of the counties governed by the act entitled "an act concerning lawful fences," approved April 27, 1855

(Stats. 1855, p. 154), and an act amendatory and supplementary thereto, approved April 3, 1860. (Stats. 1860, p. 141.)

These acts are retained in force by the provisions of section 19 of the Political Code, and the counties to which they are applicable are not subject to the provisions of section 841 of the Civil Code. (*Gonzales v. Wasson*, 51 Cal. 297.)

The Act of 1855, after prescribing the height and mode of construction of lawful fences, when of wire, of post, and rail, and various other material, proceeds as follows:—

“Section 2. Any fence which by reliable evidence shall be declared as strong, substantial, and as well suited to the protection of enclosures as either of the above described, shall be a lawful fence in all counties of this State, except Sonoma, Napa, El Dorado, and Marin.”

The fifth section of the Act of 1855 was amended in 1860 (Stats. 1860, p. 141) to read as follows:—

“When a fence has been erected by any person on the line of his land, and the person owning the land adjoining thereto shall make, or cause to be made, an enclosure on the opposite side of such fence, so that such fence may answer the purpose of enclosing his ground also, such person shall pay the owner of such fence already erected, one half the value of so much thereof as serves as a partition fence between them,” etc.

The ultimate object of a lawful fence is to so enclose land as to prevent the ingress and egress of such domestic animals as are usually nurtured and confined thereon, and to protect the premises enclosed from unlawful encroachment.

At the common law no man is bound to fence his lands against the cattle of another, but each owner is bound to restrain them, and is answerable for any trespass they may commit upon the lands of another. The word “close” is purely technical, and relates to the interest in the soil and to its invisible boundaries, and not to those artificial barriers often erected around land.

The whole duty of erecting division and boundary fences in the absence of agreement or prescription, is regulated by statute, and as will be seen by our statutes as quoted, lawful fences may consist either of the specific structures enumerated, or of any other barrier “which, by reliable evidence, shall be declared as

strong, substantial, and as well suited to the protection of enclosures as either of the above described."

Keeping in view, then, the object of a lawful fence, viz., to protect an enclosure, we are of opinion the language of the complaint in this cause sufficiently alleges that the fence constructed by plaintiff, and for the value of which he seeks to recover, was and is a lawful fence.

It is not one of the enumerated fences mentioned in the statute, but is described as a stone wall of given dimensions, constructed in a given manner, and is according to the complaint, a "good, strong, substantial, and lawful stone fence, . . . and with the other fences now does form a perfect enclosure of all said premises, and sufficient to . . . and now does prevent the ingress of stock upon or the egress of stock from said premises, and the whole thereof."

A fence which forms a perfect enclosure and is sufficient to turn stock which is good, strong, and substantial, and built of stone, must, we think, be the equivalent of the lawful fences specifically described in the statute.

The statute as amended in 1860 does not in terms provide that line or division fences shall be lawful fences; but the law having defined what is meant by a *lawful fence*, we must presume that when fences are mentioned elsewhere in the statute, lawful fences are intended. (*Enright v. S. F. & S. J. R. R. Co.* 33 Cal. 230.)

We do not conceive it to be necessary to show that all the fences surrounding and enclosing the lands of defendant are lawful fences within the meaning of the statute. If they have been adopted by him in completing his enclosure, and serve to enclose his land, and if plaintiff's fence complies with the requirements of the law, it must be held sufficient; otherwise a party enclosing his land could always prevent a recovery for fences constructed by others on his lines by omitting to build as provided by statute.

So, too, the fact of defendant connecting his fences with those already constructed so as to form an enclosure of his land with that of such others, must be construed as tantamount to an agreement on his part within the doctrine of *Gonzales v. Wasson*, 51 Cal. 295.

The road laws retained in force by the Code are not subject to the objection of being special legislation, and therefore obnoxious to the Constitution. They were in force before the adoption of our present Constitution; and that instrument only applies to statutes passed after its adoption. (*People v. Jobs*, 7 Colo. 475; *Ex parte Burke*, 59 Cal. 6.)

The demand of payment by plaintiff was sufficient.

The complaint shows the length of the division fence to be 320 rods, that the value thereof, at the time the enclosure was made, was \$1.75 for each and every rod thereof, and that one half the total value was and is \$280; that on the 14th day of October, 1881, plaintiff demanded payment of said sum from defendant, which was refused, etc. Nothing further was required to constitute a valid demand.

Counsel for respondent claims that if a recovery can be had from defendant in this case, he will be equally liable to the other persons whose fences form portions of the general enclosure within which his land is situated. A reference to the statute (Stats. 1860, p. 141) will show that it is only for a proportionate part of the value of *partition fences* that a recovery can be had.

We think the judgment should be reversed and the court below directed to overrule the demurrer.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is reversed with directions to overrule the demurrer to the complaint.

[No. 8728. Department Two.—October 22, 1885.]

E. B. LERCH, APPELLANT, v. S. M. GALLUP ET AL.,
RESPONDENTS.

INDEMNITY—VERBAL PROMISE—SURETIES—STATUTE OF FRAUDS—CONSIDERATION.—The defendants were sureties on an undertaking to stay execution on an appeal from a judgment of a Justice's Court. The appeal having been dismissed, they requested the plaintiff, a constable, to levy execution upon and sell certain personal property which they represented belonged to the judgment debtor, and verbally promised to indemnify him for any damage he might sustain by reason of the levy and sale, should they prove to be wrongful. The plaintiff, in consideration of such promise, levied upon

and sold the property and thereby satisfied the judgment. *Held*, that the promise was founded upon a sufficient consideration, and was not within the Statute of Frauds.

1D.—EXECUTION ISSUED WITHOUT AUTHORITY OF JUDGMENT CREDITOR—RATIFICATION.—The execution was issued at the request of the sureties, but the money arising from the sale was received by the judgment creditor in satisfaction of the judgment. *Held*, that the receipt of the money was a ratification of the act of sureties.

APPEAL from a judgment of the Superior Court of Stanislaus County.

The facts are stated in the opinion.

Wright & Hazen, for Appellant.

W. E. Turner, for Respondents.

BELCHER, C. C.—This is an action on a verbal promise to indemnify the plaintiff, who was a constable, for seizing and selling certain personal property under an execution.

The court below sustained a demurrer to the complaint, and the plaintiff declining to amend, judgment was entered in favor of the defendants. The appeal is from that judgment.

The facts of the case, as they appear from the complaint, may be briefly stated as follows:—

In March, 1875, one Ulloa recovered judgment against one Sotcher for fifty dollars and costs in a Justice's Court in Stanislaus County. An appeal was taken from the judgment to the County Court, and an undertaking to stay execution thereon was signed by the defendants here, as sureties for the appellant, and filed in the case. In February, 1878, the appeal was dismissed. In March, 1878, the judgment remaining wholly unpaid, an execution thereon was issued at the special instance and request of the defendants, and placed in the hands of the plaintiff for service, he being at the time a constable authorized to receive and serve the same. At the time the execution was issued Sotcher had removed from this State, and had left no property here, so far as plaintiff knew, subject to seizure and sale. The defendants informed the plaintiff that they had discovered certain personal property belonging to Sotcher, which was subject to seizure and sale, and they pointed the property out to the plaintiff, and demanded that he, as such constable, levy upon

and sell the same in satisfaction of the judgment and execution. The plaintiff, inasmuch as he did not himself know about the property, asked from the defendants a bond of indemnity to secure him against any damages he might sustain by reason of the levy and sale, should they prove to be wrongful. The defendants then assured the plaintiff that the property belonged to Sotcher, and expressly promised him that if he would levy upon and sell the property in satisfaction of the judgment and execution they would save him harmless and indemnify him for any damages he might sustain by reason of the levy and sale. The plaintiff, in consideration of the defendants' promise and at their special instance and request, then levied upon and sold the property under the execution, and thereby paid and satisfied the judgment in full.

In March, 1879, one Williams, claiming to have been the owner of the property when it was levied upon and sold, commenced an action against the plaintiff in the District Court for Stanislaus County to recover the sum of \$400, the alleged value thereof, and \$124 damages. The defendants were notified of the action, and at their request and in their behalf the plaintiff answered to the complaint and used due diligence in defending the action. The case was tried in May, 1879, and judgment was rendered in favor of Williams and against the plaintiff here for the sum of \$506.25, damages and costs. An appeal was taken to the Supreme Court, and the judgment was there affirmed in December, 1880. In May, 1881, an execution on the judgment was taken out and levied on the property of this plaintiff, and in June following he paid the judgment in full, amounting then to the sum of \$630. The plaintiff, also, in defending the action, necessarily expended the further sum of \$375 for counsel fees and other expenses; and he claims to have been damaged in the sum of \$2,000 by the seizure of his property under the execution. In August, 1881, plaintiff demanded of the defendants payment of the damages sustained by him as aforesaid, but they refused, and have ever since refused, to pay the same. This action was commenced in December, 1881, and the plaintiff asks judgment for damages in the sum of \$3,005.

We think the complaint stated facts sufficient to constitute a cause of action, and that the court erred in sustaining the demurrer.

1. The execution on the Justice Court judgment was issued "at the special instance and request" of the defendants, but it does not follow from that fact that it was issued without the knowledge and request of the party in whose favor it was given, nor, if it was, that the plaintiff knew it was so issued when it was placed in his hands for service. And if it was issued at the request of the defendants, without the knowledge of the judgment creditor, he must be held to have ratified and confirmed their act in ordering it, when he accepted the money made under it in full payment and satisfaction of his judgment. (*Clarkson v. White*, 4 Marsh. J. J. 529; 20 Am. Dec. 229.)

2. The defendants were sureties on the undertaking on appeal and were liable to be called upon at any time to pay the judgment. They were interested therein in having the money made out of the property of the judgment debtor. This was a sufficient consideration for their promise to indemnify the plaintiff if he would levy upon and sell under the execution the property which they pointed out to him and asked him to sell. (*Tarr v. Northey*, 17 Me. 113; *Train v. Gold*, 5 Pick. 380.)

3. The promise to indemnify the plaintiff was not within the Statute of Frauds.

Under our statute "a promise to answer for the obligation of another, in any of the following cases, is deemed an original obligation of the promisor, and need not be in writing:—

"1. Where the promise is made by one . . . who has received a discharge from an obligation in whole or in part, in consideration of such promise.

"3. Where the promise, being for the antecedent obligation of another, is made . . . upon a consideration beneficial to the promisor, whether moving from either party to the antecedent obligation, or from another person." (Civ. Code, § 2794.)

Here, out of the money made by the levy and sale, the judgment was satisfied, and the defendants were discharged from their obligation to pay it. Their promise was, therefore, evidently made upon a consideration beneficial to them.

4. The plaintiff appears to have acted in good faith in levying upon and selling the property pointed out to him. He committed no wilful trespass, and there is no reason, therefore,

why the promise to indemnify him should not be enforced. (*Stark v. Raney*, 18 Cal. 622; *Coventry v. Barton*, 17 Johns. 142; 8 Am. Dec. 376; *Stone v. Hooker*, 9 Cowen, 154; *Nelson v. Cook*, 17 Ill. 443; *Avery v. Halsey*, 14 Pick. 174.)

The judgment should be reversed and the cause remanded with directions to the court below to overrule the demurrer.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is reversed and cause remanded with directions to overrule the demurrer to the complaint.

[No. 8497. Department Two.—October 22, 1885.]

A. WALKER, APPELLANT, v. H. BREM, RESPONDENT.

FINDINGS—FACTS IN ISSUE—ADMISSIONS.—Findings should be limited to the facts put in issue by the pleadings, and are not required as to admitted facts. If, however, findings are made upon the admitted facts, they must be in harmony with such facts.

Id.—The findings reviewed, and held to be in conflict with admissions in the answer.

APPEAL from a judgment of the Superior Court of Stanislaus County.

The action was brought to recover the possession of certain land. The further facts are stated in the opinion.

Wright & Hazen, for Appellant.

W. E. Turner, for Respondent.

BELCHER, C. C.—1. The demurrer to the answer was properly overruled. The answer denied the plaintiff's ownership or right to the possession of the land sued for "save and except as hereinafter set forth," and then set up an equitable defense. It stated facts sufficient to constitute a defense, and as a whole was not ambiguous, uncertain, or unintelligible.

2. The findings do not meet the issues raised by the pleadings.

The answer alleges a mistake in drawing the deed from the plaintiff to the defendant, whereby the land here sued for was excepted from its operation, when, according to the agreement of the parties, there was to be and should have been, only a reservation of a temporary right of way over it. The answer admits that the title to the land in controversy is still in the plaintiff, and asks that the deed be reformed so as to express the real agreement between the parties to it at the time of its execution.

If a mistake was made in drawing the deed, as alleged, that fact should have been found in clear and unmistakable language, and being found would have constituted a defense to the action, whether the court went further and actually reformed the deed or not. (*Hoppough v. Struble*, 60 N. Y. 430.)

But the finding was only that "it was agreed at the time of the sale by the plaintiff to the defendant that so long as the plaintiff maintained and run said ferry, he should have the right of way across said corner of said land, for a road to and from his ferry landing to a point intersecting the county road, and the reservation clause in said deed as set forth in finding No. 2, was inserted for the sole purpose of reserving to plaintiff the said right of way free from all let or hindrance from this defendant while the plaintiff maintained and run said ferry."

It was then found, "that since the 13th day of March, 1878, plaintiff has not been the owner of or seized in fee of the premises described in plaintiff's complaint, or any part thereof, and since the——day of March, 1879, has not been in possession of, or entitled to the possession of said described premises, or any part thereof"; and as conclusions of law, "that the deed of conveyance from plaintiff to defendant, as set forth in finding No. 2, conveyed the absolute title of all the lands in said deed described, and that the reservation clause as set forth in finding No. 2 did not reserve in plaintiff the legal title to any portion of said described premises, nor did it entitle him to possession of any portion of said described premises, save and except during such time as he, plaintiff, was maintaining and running a public ferry, as established and maintained at the time of the sale from plaintiff to defendant."

Findings should be confined to the facts put in issue by the pleadings, and upon such facts as are admitted by the pleadings

no findings are required. If, however, findings are made upon admitted facts, they should be in harmony with the facts as admitted and not in conflict with them. "A finding which negatives the existence of a fact admitted by the pleadings is a finding against evidence, and the judgment rendered thereon is erroneous." (*Silvey v. Neary*, 59 Cal. 97.)

Here there is no direct and clear finding as to the mistake alleged, and the finding and conclusion as to the operation and effect of the deed are in direct conflict with the admissions in the answer.

It follows that the judgment must be reversed.

SEARLS, C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment is reversed.

[No. 9072. Department Two.—October 22, 1885.]

J. B. BRICHMAN, RESPONDENT, v. W. G. ROSS,
APPELLANT.

NEW TRIAL—NOTICE OF MOTION—COURT CANNOT EXTEND TIME FOR GIVING.—The right to move for a new trial is statutory, and neither the court nor a judge thereof has power to extend the time for giving notice of such motion.

ID.—OBJECTION TO NOTICE—WAIVER—APPEAL.—An objection that the notice was not given in time must be taken in the lower court, or it will be deemed to have been waived, and the time extended by consent of the parties. Such an objection cannot be raised for the first time in the Supreme Court.

ATTACHMENT—LEVY ON PERSONAL PROPERTY IN POSSESSION OF DEFENDANT IN THE WRIT—JUSTIFICATION BY OFFICER—REPLEVIN.—In an action by the owner to recover possession of personal property from an officer, who had levied upon it under an attachment against a third person in whose possession it was found, the writ of attachment is admissible in evidence as a *prima facie* justification of the act of the officer in making the levy, if the writ be regular upon its face, and issued by a court having jurisdiction of the subject-matter, and in a case where the law authorizes its issuance.

ID.—OWNERSHIP OF PROPERTY SEIZED—EVIDENCE.—On the trial of the action, the ownership of the property being in issue, the plaintiff, after testifying to his ownership, and that the defendant in the attachment suit was in possession under an unexecuted contract of sale, was asked on cross-examination to describe the property which he sold to such defendant. *Held*, that the question was proper.

ID.—JUDGMENT FOR PLAINTIFF—MUST BE IN ALTERNATIVE.—In such an action, the judgment, if in favor of the plaintiff, must be in the alternative form required by section 667 of the Code of Civil Procedure, although the property had been delivered to him,

APPEAL from a judgment of the Superior Court of Stanislaus County, and from an order refusing a new trial.

The facts are stated in the opinion.

P. J. Hazen, and *J. C. Simmons*, for Appellant.

C. C. Wright, and *W. L. Dudley*, for Respondent.

SEARLS, C.—Action to recover personal property. Plaintiff had judgment, from which and from an order denying a new trial defendant appeals.

The verdict of the jury was rendered and judgment entered thereon December 7, 1882. . .

Notice of motion for a new trial was served and filed December 18, 1882, more than ten days after verdict and judgment, and respondent claims here for the first time, so far as is shown by the record, that the motion came too late, and that the validity of the proceedings, so far as involved in the motion for new trial, cannot be considered.

1. A party intending to move for a new trial must, within ten days after verdict, file with the clerk and serve upon the adverse party a notice of such intention. (Code Civ. Proc. § 659.)

2. The right to move for a new trial is statutory, and no power is given to the Superior Court, or a judge thereof, to extend the time for giving notice of such motion. Section 1054 of the Code of Civil Procedure does not authorize such order.

3. Objection, however, that a notice of motion for new trial is not given in time must be taken in the court below, or it will be deemed to have been waived, and the time extended by consent of parties, and such objection cannot be taken for the first time in this court. (*Patrick v. Morse*, 64 Cal. 462; *Gray v. Nunan*, 63 Cal. 220; *Hobbs v. Duff*, 43 Cal. 485; *Hodgdon v. Griffin*, 56 Cal. 610.)

It follows that the objection of respondent is untenable, because not taken in the court below.

It appears the action was brought to recover personal property, the furniture and fixtures in a restaurant, which according to the evidence, plaintiff had contracted to sell to one Flanders,

when the latter should pay the purchase price thereof, until which time plaintiff was to retain the title. Flanders paid a part of the purchase price, and was placed in possession of the furniture and engaged in the business of keeping a restaurant, using the furniture in question therein.

Defendant denies plaintiff's ownership of the goods and chattels, avers that plaintiff took possession of the property under proceedings in claim and delivery in this action, and still retains such possession, and for a further answer avers that he is a constable in and for Empire township, county of Stanislaus, and that as such, he levied upon and took possession of the goods in question, under and by virtue of a writ of attachment issued out of a Justice's Court, in an action in which one John Simon was plaintiff and E. Flanders was defendant.

That the property in dispute was owned by Flanders and was taken from his possession under said writ, which ran against his property, etc.

Defendant first offered in evidence the writ of attachment, which was objected to as insufficient to justify him as constable in seizing the property without proof of the regularity of the proceedings under which it issued. The objection was sustained by the court, whereupon the pleadings, summons, undertaking on attachment, and affidavit for attachment, as well as the writ, were offered in evidence.

Objection was made to the sufficiency of the affidavit for an attachment, which showed that defendant (Flanders) was indebted to him, the said plaintiff, in the sum of \$141.14 on contract, but failed to show whether upon an *express* or *implied* contract.

The objection was sustained and the papers excluded, and the rulings are assigned as error.

The first question presented is as to the sufficiency of a writ of attachment, regular upon its face, to justify the officer acting under it.

Ministerial officers are presumed to know the law, and are bound at their peril to know the general jurisdiction of the courts, whose process they are called upon to enforce, and if they execute process which the court has no jurisdiction to issue, they are liable. (Freeman on Executions, § 100.)

If, however, a writ is issued by the proper officer, in due form, in a case where he has jurisdiction and authority to exercise jurisdiction over the subject-matter of the writ, and there is nothing on the face of the writ showing it to be illegal, the officer to whom it is directed, and whose duty it is to execute it, may do so, and justify his acts thereunder by producing the writ, although from some cause not apparent on the face of the writ, the whole proceeding is irregular or void. (Freeman on Executions, § 101, and cases cited.)

The rule is the same in case of process issuing out of courts of limited jurisdiction. (*Savercoul v. Boughton*, 5 Wend. 170.) "A sheriff or other ministerial officer is justified in the execution of, and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued." (Pol. Code, § 4187.)

It is said by Drake in his work on Attachments, § 185, a:—

"When the officer attaches property found in the possession of the defendant, he can always justify the levy by the production of the attachment writ, if the same was issued by a court or officer having lawful authority to issue it, and be in legal form. But when the property is found in the possession of a stranger claiming title, the mere production of the writ will not justify its seizure thereunder; it rests upon the officer to go further and prove that the attachment defendant was indebted to the attachment plaintiff. If in the attachment suit, judgment was rendered in favor of the plaintiff, that will establish the indebtedness of the defendant; if not, the officer must otherwise prove the indebtedness, in order to justify his proceeding." (*Thornburg v. Hand*, 7 Cal. 554; *Damon v. Bryant*, 6 Pick. 411; *Rinchey v. Stryker*, 28 N. Y. 45; *Horn v. Corvarubias*, 51 Cal. 524; *Sexey v. Adkinson*, 34 Cal. 346.)

In the case last cited our Supreme Court held to the doctrine enunciated by Drake as above quoted, and in very nearly the language of that author.

In *Babe v. Coyne*, 53 Cal. 261, the writ under which a sheriff had made a levy, and the affidavit on which it was issued, were introduced in evidence, and this court held that it made out a *prima facie* case of justification of the seizure of the property,

notwithstanding the affidavit was originally insufficient, and was amended subsequent to the seizure. This was in a case where the property was in the possession of the defendant, and was attached as his property. Had the affidavit not been offered with the writ, the ruling would doubtless have been the same.

The reason for the distinction between cases where the writ is levied upon property in possession of the defendant in the writ, and where the property is found in possession of a stranger to the writ, is found in the fact, that the defendant may, if the attachment has been improvidently issued, move to have it quashed or have an action upon the undertaking, while a third party, a stranger to the writ and the record, could not be heard for such purpose; hence, the justice of requiring an officer who takes property, not from the defendant against whom the writ runs, but from the possession of a stranger, whom the law presumes to own it, to show not only his writ, but that it issued regularly, upon a valid demand against the defendant named in such writ.

It follows from these views, that as the property in dispute was found in the possession of Flanders, and was levied upon by the constable under a writ of attachment against him, regular upon its face, issued by a justice of the peace having jurisdiction of the subject-matter, and in a case where under the law he was authorized to issue the same, that the writ of attachment was admissible in evidence in justification of the act of the officer in making such levy, and to exclude it was error.

It must not be understood that we hold the writ as anything more than *prima facie* evidence of the right of the constable to make the levy and take possession of the property. If it in fact belonged to plaintiff, he was entitled to recover upon proving the property to be his.

It follows that if the writ of attachment was admissible in evidence when offered by itself, it was equally admissible when offered with the summons, affidavit, etc., in connection with it.

At the trial plaintiff was sworn as a witness in his own behalf, and gave evidence tending to show that in March, 1882, he was the owner of the property in question, and entered into a contract with Flanders to sell to him the property for \$1,000, plaintiff to retain the title until the property was paid for—

that Flanders paid or secured \$300 of the purchase money. Plaintiff then rented to Flanders a restaurant in which the property was used, and gave possession of the personal property to Flanders, who was to pay rent, interest on the purchase money due, and to have the personal property when he paid for it.

On cross-examination the witness was asked the following question by counsel for defendant:—

“Describe the property which you sold to Mr. Flanders?”

Counsel for plaintiff objected to the question upon the ground that it was immaterial and irrelevant. The objection was sustained by the court, and the ruling is assigned as error.

Plaintiff's ownership of the property was denied by the answer, and having testified to such ownership and as to a contract of sale to Flanders, under which the latter was placed in possession, it was proper, on cross-examination, to inquire as to the precise property included in the transaction, defendant had a right to show by the witness, if he could, that the alleged contract of sale was in fact a sale *in presenti*, or that the contract did not include all the goods levied upon, etc.

We think the court erred in sustaining the objection to the question.

We find no error in the other points made by defendant, upon the refusal of the court to permit the witness to answer questions propounded.

Judgment was rendered in favor of the plaintiff for the possession of the property described in the complaint, and for costs, but did not provide for a recovery of its value as provided by section 667 of the Code of Civil Procedure.

The property had already been delivered to plaintiff.

Under these circumstances, respondent claims that no injury was done to appellant by a failure to provide in the judgment for a recovery of the value of the property, and his contention seems plausible.

But in *Berson v. Nunan*, 63 Cal. 550, it was held that in actions to recover personal property, the judgment must be in the alternative form, required by section 667 of the Code of Civil Procedure.

We are of opinion the judgment of the court below and the order denying a new trial should be reversed and a new trial had.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

[No. 9988. Department One.—October 29, 1885.]

REBECCA RODGERS, APPELLANT, v. CENTRAL PACIFIC
RAILROAD COMPANY, RESPONDENT.

RAILROAD—DEATH OF EMPLOYEE—LIABILITY FOR.—A railroad company is liable for the death of an employee caused by the falling of a bridge negligently constructed and maintained by the company as a part of its road.

Id.—ACT OF GOD.—If the falling of the bridge resulted from an act of God, the company is not liable unless its negligence was a contributing cause of the accident, and in order to charge the company in such a case, it must be guilty of negligence amounting to a want of ordinary care.

JURY—RECEIVING EVIDENCE OUT OF COURT.—A jury is guilty of improper conduct in receiving evidence out of court.

APPEAL from an order of the Superior Court of Sacramento County granting a new trial.

The facts are stated in the opinion.

W. B. Treadwell, and *A. P. Catlin*, for Appellant.

S. C. Denson, for Respondent.

SEARLS, C. — This is an action to recover damages for the death of plaintiff's son, claimed to have been caused by the negligence of the corporation defendant. Plaintiff had verdict which was set aside by the court below and a new trial granted. Plaintiff appeals from the order granting a new trial.

James McGregor Rodgers, the intestate of plaintiff, who was a servant of defendant and firemen on one of its locomotive engines, was killed in a train accident at China Gulch, in Shasta County.

An important question at the trial was whether defendant was guilty of negligence in the construction and maintenance of a bridge across said gulch, by the fall of which the train in question was precipitated into a chasm and decedent killed, or

whether the accident was due to an enormous downflow of water caused by what is familiarly known as a cloud-burst, and constituting what is designated as an "act of God."

The court below very properly instructed the jury in effect that if the accident was attributable to a "superhuman or irresistible cause" to an "act of God," the defendant would not be liable, that as a general principle no man shall be responsible for that which no man can control, and then proceeded in his instruction as follows:—

"But if in addition to the act of God, so called, the intervention of man takes place, co-operating with it and commingling with it to any extent, however slight, and an injury then results, the injury is to be ascribed not to the act of God—which would constitute no defense in the case supposed—but to the act of man; and therefore if the negligence of a human being concurs with the act of God and causes an injury, the party thus negligent would be responsible therefor."

The objection taken to this instruction on the motion for new trial was that it did not discriminate between the different degrees of negligence, that it gave the jury to understand that if the act of the defendant *in the slightest degree* concurred with the act of God in producing the injury complained of, the defendant would be liable without regard to whether the negligence proven on its part was *slight, ordinary, or gross*.

The court below was of opinion defendant was only liable to its employee for want of ordinary care, and not for slight negligence, and therefore that the instruction tended to mislead the jury and was erroneous.

"Where an employment is accompanied with risks of which those who enter into it have notice, they cannot if they are injured by exposure to such risks, recover compensation from their employer." (Wharton on Negligence, § 200.)

Where, however, an employment involves special risks known to the employer, but of which the servant is not cognizant, and which are not patent, it is the duty of the employer to acquaint the servant therewith, and failing to do so, he will be liable for injury from such risks, suffered by the employee. (*Baxter v. Roberts*, 44 Cal. 188.)

Manifestly it was the duty of the defendant, a railroad com-

pany, to furnish alike to its passengers and employees a suitable and safe road, engines, cars, and appliances for conducting its business, to select competent and reliable servants, the nature of the business considered. This duty performed, and if from some extraordinary cause or condition, extrinsic to defendant's action, an injury results, defendant is not liable.

Responsibility ceases where accident intervenes.

If there is nothing to be imputed to a defendant, there is nothing with which he is chargeable.

If, however, the negligence of a defendant has combined with the act of God, with inevitable accident in producing the injury complained of, he is liable.

The question presented here is as to the degree of negligence which thus combining with a *superhuman or irresistible cause*, will render a defendant liable.

According to the instruction given by the court below, if the act of the defendant co-operated and commingled *to any extent, however slight*, with the accident, defendant would be liable.

We do not think this is or should be the rule as to the liability of a defendant engaged in a lawful pursuit to his employee.

"Where a man engaged in a lawful business exercises reasonable care, the law does not make him an insurer of others against those consequences of his actions which reasonable care and foresight could not have prevented. The law justly ascribes such consequences to inevitable misfortune, or to the act of God, and leaves the harm resulting from them to be borne by him upon whom it falls. The contrary rule would obviously be against public policy, because it would impose so great a restraint upon freedom of action as materially to check human enterprise." (Thompson on Negligence, 1234, 1235. See also *Brown v. Kendall*, 6 Cush. 292; *Morris v. Platt*, 32 Conn. 75.)

The Civil Code of this State, section 1971, is as follows:—

"An employer must in all cases indemnify his employee for losses occasioned by the former's want of ordinary care."

The Code having thus established the rule by which to ascertain the liability of the employer to his employee, it is not within the province of the courts to depart from it.

The instruction as given was violative of the rule, and the new trial was properly granted.

2. So, too, we think the acts of the jury in receiving evidence out of court were improper.

Other errors were assigned as grounds for the motion, but as the action of the court in awarding the new trial was based upon the points herein noticed, we do not deem further discussion necessary.

We are of opinion the order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the order is affirmed.

Hearing in Bank denied.

[No. 9564. Department One.—October 29, 1885.]

J. C. HOULT ET AL., RESPONDENTS, v. E. J. BALDWIN,
APPELLANT.

SALE—MANUFACTURED ARTICLE—IMPLIED WARRANTY.—Under sections 1769 and 1770 of the Civil Code, one who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defect not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein; and one who manufactures an article under an order for a particular purpose warrants by the sale that is reasonably fit for such purpose.

ID.—EXPRESS WARRANTY OF FITNESS—BREACH BY SELLER—RESCISSION BY BUYER.—Upon a breach by the seller of either of such implied warranties, or upon a breach by him of an express warranty that the article manufactured and sold would do good work of a particular kind, the buyer has a right to rescind the sale by returning or offering to return the article to the seller.

ID.—GUARANTY—WHEN PART OF CONTRACT.—The machine in question was manufactured and sold by the plaintiffs on the order of an agent of the defendant. At the time of the order, the plaintiffs notified the defendant that they intended to deliver the machine upon the cars, and that their responsibility, so far as the working thereof was concerned, should then cease. The defendant refused to accept it upon these terms, and demanded a guaranty that it would do good work. The plaintiffs thereupon executed and forwarded to him a written guaranty to that effect. *Held*, that the guaranty was a part of the contract of sale, and supported by a sufficient consideration.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial.

The facts are stated in the opinion.

Lloyd & Wood, and J. A. Loutitt, for Appellant.

J. C. Campbell, and W. L. Dudley, for Respondents.

BELCHER, C. C.—This is an action to recover the purchase price of a harvesting machine known as a combined header and separator.

The machine was manufactured by the plaintiffs at the city of Stockton, and is alleged to have been sold and delivered by them to the defendant in the month of May, 1878.

About the middle of April of that year the defendant was at Stockton, and in company with one H. C. Shaw, who resided there, went to the plaintiff's shops and saw some of the machines, which were in process of construction.

After leaving the shops, defendant said to Shaw: "If I write up to you to secure one of these machines, will you attend to the business for me?" and Shaw said he would.

None of the machines were then finished, or expected to be finished, for nearly a month.

The defendant then went away, and a correspondence was carried on between him and Shaw, and to some extent between him and the plaintiffs, in reference to the purchase of a machine and the terms and conditions on which one would be furnished.

On the 23d of April, Shaw left an order for one of the machines, and on the 15th of May one was finished and placed on a car to be shipped to the defendant's ranch in Los Angeles County.

When the machine arrived at the railway station nearest to the ranch, it was carefully taken from the car, and the detached parts were put together. Animals were then harnessed to it, to haul it away, but before it had gone more than forty or fifty feet from the depot, upon a dry, hard, and level road, the tiller-post, by which the guiding wheel was attached to the tongue, broke, and it could be moved no further. A telegram was immediately sent to the plaintiffs, notifying them of the break, and they at once sent forward a duplicate casting to take the place of the broken one. The new casting was put in place and another effort was made to haul the machine to the ranch, but before it had gone many feet the new casting also broke.

The defendant then declined to accept the machine, and offered to return it to the plaintiffs, and to pay the return freight thereon.

This was the first machine which went out from the plaintiffs' shops during that year, and very soon after it was shipped an improvement was introduced and used upon all the other machines by which the tiller-post was strengthened. "It was made heavier; more metal was used in the plate or bottom part, and a stirrup or iron strap was put around it." The plaintiffs did not offer to furnish to the defendant the improved tiller-post, or notice in any way the fact that the machine had become disabled a second time. They waited four months without demanding pay for the machine, or making any suggestion about its use or return, and then commenced this action.

In defense of the action the defendant set up a warranty of the machine, a breach of the warranty, and a prompt offer to return the machine to the plaintiffs after he discovered its insufficiency.

The case was tried before a jury, and the verdict was in favor of the plaintiffs "for the full amount claimed, with interest."

The defendant — appellant here — now insists that the verdict was not justified by the evidence, and that the court erred in giving certain instructions, and refusing to give other instructions to the jury.

We think the motion for a new trial should have been granted.

It appears from the testimony in the case that on the very day the machine was ordered, the defendant was notified of the fact of its being ordered, and that the plaintiffs proposed to deliver it upon the cars, and that their responsibility, so far as the working of the machine was concerned, should then be at an end; that the defendant was unwilling to accept it on those terms and demanded a guaranty that it would do good work; that the plaintiffs at once acceded to the demand, by executing and forwarding to the defendant a written guaranty that the machine would do good work in cutting and thrashing ordinary grain, standing from one to five feet in height.

When the defendant demanded the guaranty he added that he would be willing to pay the expenses of a man to start the machine on his ranch and test the same. The plaintiffs in reply said: "We will send a man with the machine, you paying his

expenses to your ranch and back. He will start the machine and show to your satisfaction that it is all that we have represented it to be."

The machine was sent forward, but the plaintiffs did not send a man with it, nor did they send one after they were notified that it had broken.

It is claimed for the respondents, that their guaranty was made after the sale was complete, and that it was therefore without consideration and void, and that at any rate one of the conditions of the guaranty was that the man sent by the plaintiffs should *start the machine*, and as defendant endeavored to start it without notifying them, they are entitled to recover in this action the price of it.

This position cannot be maintained. It is clear from the testimony that the guaranty was not made after the sale was complete, and it was not without consideration and void. It is also evident that when the plaintiffs promised to send a man to start the machine, they meant to start it in the grain-field, and not from the railroad depot to the ranch.

But if the respondents were right in their contention as to the written guaranty, still the Civil Code provides:—

"Section 1769. One who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.

"Section 1770. One who manufactures an article under an order for a particular purpose, warrants by the sale that it is reasonably fit for that purpose."

The warranties provided in these sections are as broad at least as the written guaranty, and must be held to have attended and been conditions of the sale.

Having taken the machine then under a warranty, whether it be that expressed in the writing or provided by the Code, or both, the defendant had the right, if there was a breach of the warranty, that is, if in any respect the machine was not what it was warranted to be, to rescind the sale by returning or offering to return it to the plaintiffs. (*Polhemus v. Heiman*, 45 Cal. 573.)

The principal questions for the jury were: Would the machine, as sent forward, do good work in cutting and threshing ordinary grain from one to five feet in height? Was it reasonably fit for the purpose for which it was ordered? Was there any latent defect arising from the process of manufacture not disclosed to the buyer?

The theory of the plaintiffs at the trial was that their responsibility in respect to the machine ceased when it was placed on the cars at Stockton, and that they then became entitled to demand and receive the agreed price for it.

This theory finds expression in instruction No. 1, given at the request of the plaintiffs, and in the modification of instruction No. 4, given at the request of the defendant. The theory, as we have seen, was wrong, and the court erred in giving the plaintiffs' instruction and in refusing to give, without modification, that of defendant.

The court also erred, we think, in striking off a part of instruction No. 1, and in refusing to give instructions No. 9 and 10, asked by defendant.

As the case must be tried again and be somewhat differently presented, we do not deem it necessary to speak particularly of the other instructions given and refused.

The judgment and order should be reversed and the cause remanded for a new trial.

SEARLS, C., and FOOTE, C., concurred.

The COURT. — For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

[No. 9802. Department One.—October 29, 1885.]

A. C. TAYLOR ET AL., APPELLANTS, v. CENTRAL PACIFIC RAILROAD COMPANY ET. AL., RESPONDENTS.

FINDINGS—ADMISSIONS IN PLEADING.—No findings are necessary as to facts admitted by the pleadings.

POSSESSION—WHEN IMPARTS NOTICE.—Possession of land, in order to impart notice of the rights and equities of the holder, must be actual, open, exclusive, notorious, and visible.

CONTRACT FOR PURCHASE OF LAND—ACTION TO ENFORCE—FINDINGS.—The action was brought by the plaintiffs, suing as husband and wife, to compel the defendant Davis to assign a contract for the purchase of certain land owned by the Central Pacific Railroad Company, and to require the company to convey the land to them. The plaintiffs claimed to have a prior right to purchase the land under an alleged contract entered into by the company with the wife, which contract was founded upon an alleged acceptance of, and compliance with the conditions of a circular issued by the company. The court found that the company had issued a circular in which it invited persons to settle upon and improve its lands, and promised that those so doing, and who should file applications therefor, should be preferred purchasers. The court further found that no application to purchase had been filed by the wife, and that she never settled upon or improved the land, as required by the circular. *Held*, that the findings were sustained by the evidence.

ID.—EVIDENCE—DECLARATIONS OF VENDOR.—On the trial of the action, the plaintiffs offered to prove certain declarations made by the officers of the company in reference to a sale of the land. It did not appear from the offer whether the declarations were made before or after the execution of the contract for the purchase by the defendant Davis, nor was he shown to have been present at or to have had any knowledge of the declarations. *Held*, that the evidence was properly rejected.

ID.—NOTICE—POSSESSION.—The defendant Davis testified that at the time of his contract to purchase, he had no knowledge that any portion of the land had been enclosed by the plaintiffs, or that they had made any application for the purchase thereof. *Held*, that the evidence was admissible as tending to show that the defendant had no notice of the alleged equities of the plaintiffs.

ID.—DEFAULT—JUDGMENT—TRUSTEE—LEGAL TITLE.—The company having failed to answer, its default was entered, and findings and a judgment were subsequently rendered in favor of the defendant Davis. *Held*, that the company was a trustee, holding the legal title to the land for him, and that if the plaintiffs were not entitled to relief as against him, they could not enforce a deed from his trustee.

APPEAL from a judgment of the Superior Court of Tehama County, and from an order refusing a new trial.

The facts are stated in the head-notes and opinion.

John F. Ellison, for Appellants.

J. T. Matlock, *Clay W. Taylor*, and *Creed Haymond*, for Respondents.

SEARLS, C. — This is an action to compel Charles Davis, one of the defendants, to assign to plaintiffs a contract for the purchase of certain railroad lands, entered into by the Central Pacific Railroad Company with said Davis, and to require said Central Pacific Railroad Company to convey said lands to plaintiffs upon their making full payment therefor.

The cause was tried by the court without a jury, and upon the findings a judgment for costs was rendered in favor of defendant Davis.

From this judgment, and from an order denying a new trial, plaintiffs appeal.

Objection is taken to a portion of the fourth finding of the court, which is as follows:—

“That heretofore, and prior to June 25, 1883, said defendant, the Central Pacific Railroad Company, issued and had distributed a circular by which it invited people to settle upon and improve its lands, and promised that should they do so, the persons so settling and improving said lands, *and who should file applications therefor*, should be preferred purchasers for said lands when they were offered for sale by said company.”

The objection is aimed at the words in italics, which it is claimed are not warranted by the evidence.

The contention of appellants is, that in the circular of the railroad company, which is the only evidence on the subject, it nowhere appears that those “who filed applications” should be preferred purchasers.

The circular in question (which is too long for insertion here) commencing at page 27 of the Transcript, provides that “all persons who desire to purchase lands from the railroad company should make application to the land agent at the land office of the company in San Francisco, Cal., either personally or by letter, describing the land by section, etc. . . .

“This application will be filed and the land will not be sold without giving the applicant thirty days’ previous notice.

“An application for land confers no right or privilege on the applicant. It is merely a notice that he wishes to buy.

“The first application is not given precedence. . . .

“Settlers and actual occupants who in good faith cultivate and improve lands belonging to the company will generally be

given preference of purchase at the regular price, and they are invited to settle upon and improve the vacant lands, whether they are applied for or not by other persons. . . .

"Applications to purchase lands can be filed in the land office of the company at any time after survey by the government, but no application will be enacted upon until three months after . . . plats shall have been filed. . . .

"Blank applications will be furnished. . . .

"In filling in blanks it is requested that," etc.

From the foregoing extract it would appear that the railroad company was desirous of selling its lands; that it invited actual settlers and informed them that generally such settlers would be given a preference.

It also invited applications for purchase, announced that they would file them—that blanks would be furnished—gave instructions as to the mode of filing them.

It specified that an application would confer no right or privilege on the applicant.

From these and other clauses in the circular we draw these conclusions:—

1. The company did not desire to fix an iron-clad set of rules, applicable to all cases, without exception.

2. That its mode of selling was through application to purchase, filed in its land office.

3. That to actual settlers on its lands who were such applicants for purchase, a preference would usually be given, whether they were the *first applicants* or not.

4. The provisos that an application to purchase conferred no right, and that the first application is not given precedence over those which may be filed later, were inserted the better to enable the company to carry out its object of giving a preference to actual settlers.

If the contention of the appellants can be supported, and an actual settler upon railroad lands could hold without an application to purchase, then, under the rules, he need never apply to purchase. His possession and improvements would constitute a bar to the purchase by others, and he might continue to hold forever, or at least until some new rule was formulated.

It is usually understood that two parties are essential to every contract of sale, a seller and buyer; that their wishes and intentions must concur to effect such sale.

In the present case the evidence of such concurrence on the part of the purchaser is to be found in his application to purchase.

We are of opinion, therefore, that the finding of the court below was amply supported by the evidence, and that any other deduction not in consonance therewith would have been unwarranted.

The fifth finding is to the effect that said plaintiff failed and neglected to accept and comply with the terms offered by the company, that she never filed or offered to file any application for the land.

That she never entered upon or cultivated, or put valuable improvement upon the land, save and except that about twenty acres of said tract was within the enclosure of plaintiff, which enclosed other and adjoining land owned by her, and that of the twenty acres thus enclosed some twelve acres were planted in alfalfa.

So far as the objection to this finding is based upon the same theory as that advanced against No. 4, nothing in addition need be said, except that the evidence as to whether plaintiff ever at any time made an application to purchase the land was conflicting.

There was testimony tending to show that no application whatever was on file at the land office, and that up to the time of the sale of the land, the railroad company never knew the plaintiff, M. J. Taylor, as an applicant to purchase.

According to her own testimony, as given on cross-examination, she went to San Francisco and saw B. B. Redding, who was the land agent of the company, and "nothing further took place between us, except a verbal conversation. I did not make out an application for the land at that time."

It is to be inferred from the testimony that at that time the land comprised a town site and was not therefore for sale.

There is also a substantial conflict in the testimony as to whether plaintiffs ever occupied or improved any of the land in question, except the twenty acres, and as to that quantity, it may well be doubted if it was not occupied by reason of a mistake as

to the whereabouts of the subdivision lines of the government survey.

The findings and each of them seem to us to be supported by evidence, and a diligent examination fails to show any sufficient cause for pronouncing them in conflict therewith.

It was not necessary for the court to find upon the allegation of the complaint that plaintiff was not notified of the time and place of the sale, for the reason that no issue is made in reference to that question. It is an admitted fact under the pleadings.

Plaintiff complains that there is no finding upon the tenth allegation of her complaint, that defendant Davis never occupied the land, or any part thereof, and never improved the same, and that she had been in the exclusive possession for more than two years.

The answer is to be found in the fifth finding and in the thirteenth, both of which are supported by evidence.

The errors of law relate:—

First—To the refusal of the court to permit J. J. Stewart, a witness for plaintiffs, to state what was said to him in reference to a sale of this land, by the officers of the railroad company, when he visited San Francisco with a view of purchasing it.

We cannot see that the declarations were admissible, for the reasons:—

1. That it does not appear from the offer of plaintiffs when they were made, whether before or after the contract for purchase by defendant.

2. Defendant is not shown to have been present, or to have had any knowledge of such declarations, without which they would not bind him.

Second—To the action of the court in permitting defendant, under objection, to testify at the time he purchased the land in question he had no knowledge that any portion of it was within the enclosure of plaintiffs.

The question of notice to defendant was one of the mooted points in the case, and it was entirely competent for him as a witness to state his information on the subject.

Third—To a like ruling upon the objection of plaintiff, to testimony of defendant, that at the time he contracted to pur-

chase the land, he did not know and had never heard of any application by plaintiff to purchase the same.

The testimony was material, under the issues made by the pleadings.

The theory that plaintiff was in possession of the land, and that such possession was notice of her rights and equities, and, therefore, that it was incompetent to prove that defendant knew nothing of her possession, cannot be sustained.

Possession, in order to impart notice of the rights and equities of the holder, must be actual, open, exclusive, notorious, and visible. *Smith v. Yule*, 31 Cal. 180; *Pell v. McElroy*, 36 Cal. 268; *O'Rourke v. O'Connor*, 39 Cal. 442; *Polack v. McGrath*, 32 Cal. 15.)

The possession of plaintiffs was denied, and except the portion enclosed with her adjoining land, the court very properly, as we think, found against her claim.

She had not settled upon nor improved the land in any proper sense.

The case as made is essentially different from that of *Boyd v. Bricken*, 55 Cal. 427.

The alleged error of the court in rendering judgment in favor of the defendant, the Central Pacific Railroad Company, is not supported by the record.

This defendant having failed to answer, its default was entered, and as far as appears no action was afterward taken in reference to it, except that in the conclusions of law it is found that plaintiff is not entitled to a judgment compelling the defendant, Charles R. Davis, to assign his contract for the purchase of the land to said plaintiff, and compelling said railroad company to convey said land to her.

The railroad company having contracted to sell the land to the defendant Davis, was in the attitude of a trustee, holding the legal title for him, and if the plaintiff was not entitled to relief as against him, she was not in a position to enforce a deed from his trustee.

The judgment was for the defendant, Charles R. Davis, for costs of suit.

We are of opinion the judgment and order appealed from should be affirmed.

BELCHER, C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are affirmed.

[No. 9860. Department One.—October 30, 1885.]

MANUEL ENOS, RESPONDENT, v. SUN INSURANCE
COMPANY, APPELLANT.

FIRE INSURANCE—POLICY—APPLICATION—NOTICE TO AGENT—INSURER WHEN NOT BOUND BY.—A policy of fire insurance expressly exempted the insurer from being bound by any act or statement not contained in the application for or indorsed on the policy. *Held*, that notice to its agent as to a matter different from that contained in the policy and application did not bind the insurer.

ID.—CONDITIONS OF POLICY—HOW WAIVED.—The policy further provided that nothing less than a distinct, specific agreement, indorsed on or attached to the policy, should be construed as a waiver of any printed or written conditions or restrictions therein. *Held*, that a local agent of the insurer could not waive any of the provisions of the policy, except in the mode thus provided for.

ID.—FISHING SCOW—BUILDING—QUESTION FOR JURY.—A question involved in the action was whether or not the property insured, a fishing scow, was a building within the meaning of that word as used in the policy. *Held*, that the question was one of fact to be determined by the jury from all the surrounding circumstances.

APPEAL from a judgment of the Superior Court of Sacramento County, and from an order refusing a new trial.

The facts are stated in the opinion.

Grove L. Johnson, for Appellant.

Freeman & Bates, for Respondent.

FOOTE, C.—Action on a fire insurance policy. The plaintiff had judgment for the amount claimed; the defendant moved for a new trial, which was denied. From the order made therein and the judgment, an appeal was taken. The case was tried by a jury.

One of the questions involved in it was, whether or not the fishing scow, which was insured, was in the policy of insurance included in the word “building,” and thereby affected by all the terms and conditions of the policy as a building. The

defendant contended that it was so included, and that therefore it being *unoccupied* both at the time it was insured and at the time it was burned, the plaintiff could not recover.

Another was whether or not the scow belonged at the time the policy was issued, and it was burned, to the plaintiff, or to one Valine.

The policy in question, among other things, contained the following clauses:—

“*First*—The assured covenants that every fact and circumstance affecting the risk or hazard adversely to this company has been fully made known to the company.

“*Second*—That this company shall not be bound by any act or statement which is not contained in the written application, or indorsed on this policy.

“*Third*—*Waiver*. The use of general terms or anything less than a distinct, specific agreement, indorsed or attached to this policy, shall not be construed as a waiver of any printed or written condition or restriction herein.

“*Fourth*—Conditions voiding this policy, without written permission indorsed hereon, or stated in writing in the application for this insurance, . . . or if the above-described building or buildings, or either of them, now are, or shall become vacant or unoccupied.”

According to the second clause, it seems that the Sun Insurance Company, in its contract with the insured, had expressly exempted itself from being bound by “any act or statement” not contained in the application for the policy, or indorsed on said policy. Hence no notice to its agent as to anything different from what the policy and application contained would bind the company, and the defendant’s instruction No. 4 on this point asked should have been given.

Instruction No. 3 should have been granted, as the local agent according to the terms of the policy could not, as claimed, waive any of the provisions of the policy; it could only be done by writing on it or the application. (*Shuggart v. Lycoming Fire Ins. Co.* 55 Cal. 408-413; *Gladding v. Ins. Assoc.* 66 Cal. 6; *McCormick v. Springfield Fire Ins. Co.* 66 Cal. 361; *Silverberg v. Phœnix Ins. Co.* 67 Cal. 36.

The defendant offered to prove by the witness, Frank I. Lewis, who had been for fourteen years engaged in the fishing business on the Sacramento River, that scows of the kind and character as the one insured were used and occupied as buildings by the persons owning them; that in the fishing season such persons used them as residences and places of business, and that when the fishing season was over they used them as residences on land; that this particular scow was so used, and that in the same locality as that of the one in controversy other scows were so used.

This evidence so offered was admissible. And upon it and the circumstances surrounding the transaction, it would have been proper for the court by instructions to have left the jury to determine, as a matter of fact, whether or not the parties making this contract of insurance, intended that all the limitations and conditions thereof should apply to the scow as a building. This testimony having been excluded, the instructions on the point became useless and misleading.

None of the testimony as to conversations with Hoagland was competent. Nor was the proof offered by the defendant as to what consideration Enos had paid for the scow, as there was no question of a fraud on creditors involved in the case.

In so far as the charge of the court announced the law to be different from what we have indicated it to be in this case, there was error.

The judgment and order should be reversed and the cause remanded for a new trial.

BELCHER, C. C., and SEARLS, C., concurred.

The COURT.—For the reasons given in the foregoing opinion the judgment and order are reversed and cause remanded for a new trial.

[No. 11284. In Bank.—October 30, 1885.]

THE PEOPLE, PETITIONER, v. FLEET F. STROTHER,
RESPONDENT.

CONSTITUTION—AMENDMENT—BOARD OF EQUALIZATION.—The amendment of 1884 to section 9, article xiii., of the Constitution, was properly adopted.

APPLICATION for a writ of mandate. The facts sufficiently appear in the opinion of the court.

Attorney-General Marshall, W. T. Baggett, and Hall & Rodgers, for Petitioner.

Doyle, Galphin & Scripture, for Respondent.

MYRICK, J.—Application for mandamus to compel the auditor of the city and county of San Francisco to enter in his books an increase of the assessments by adding a percentage in accordance with the direction of the State board of equalization.

The reasons presented on behalf of the auditor why the writ should not issue have been considered by us. For lack of time we cannot enter into a full discussion in this judgment of those reasons. As the time for performing the duty is rapidly passing, it is of more immediate importance to know the duty than its reasons. Other cases are before us involving some of the questions here concerned; and in those cases we shall give our views more at length.

The substantial question involved is whether the amendment of section 9, article xiii., of the Constitution was properly adopted. Independent of that question there is but little in the objections urged on behalf of respondent; no matter appears to us which renders it impossible for him to comply with the order.

We are of opinion that the amendment referred to was constitutionally adopted.

Let the writ issue as prayed for, forthwith.

MORRISON, C. J., and MCKINSTRY, J., concurred.

[No. 9867. In Bank.—October 30, 1885.]THE PEOPLE, PLAINTIFF-APPELLANT, v. PITTSBURG
RAILROAD COMPANY, DEFENDANT-APPELLANT.

CONSTITUTIONAL LAW—TAXATION—ASSESSMENT—EQUALIZATION.—Section 9 of the Act of March 18, 1874, authorizing an assessment for taxes in the city and county of San Francisco, after the time within which the board of supervisors can meet for the purpose of equalization, violates both the State Constitution and the fourteenth amendment to the Constitution of the United States, and its validity may be attacked even by one who has failed to furnish the statement required by section 3629 of the Political Code.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco.

The plaintiff appeals from so much of the judgment as denies interest; and the defendant from so much as gives the plaintiff judgment for the tax and penalty. The remaining facts are stated in the opinion of the court.

W. T. Baggett, and *James A. Waymire*, for Plaintiff-Appellant.

John B. Harmon, for Defendant-Appellant, cited *Hobart v. Tillson*, 66 Cal. 210, and the cases there cited.

MCKINSTRY, J.—The action is to recover city and county and State taxes for the fiscal year 1880–81, as entered upon the “supplemental tax roll,” under the Act of March 18, 1874. (Stats. 1873–74, p. 477.) The assessment was made after the board of equalization had finally adjourned, and under the *ninth* section of the act above cited:—

The Constitution of the State contemplates: *First*, assessment by the assessor; *second*, action by the county board of equalization; *third*, action by the State board of equalization. Under section 9 of article xviii., the tax-payer is entitled to notice of the meeting of the county board at which his taxes may be increased. But the ninth section of the Act of 1874, attempts to provide for an assessment by the assessor (*of the city and county of San Francisco*,) which is arbitrary and absolute, without the possibility of equalization by the board of supervisors, as it provides for assessment to be made after the time within which the board can act. The legislature has no power thus to deprive the citizen of an

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opportunity of appearing before the board for the purpose of contesting the amount assessed against him. The ninth section is violative both of the Constitution of the State and of the fourteenth amendment of the Constitution of the United States.

It is urged that defendant cannot rely upon the invalidity of the statute, because he failed to furnish the assessor with a list of his taxable property. The Political Code makes it the duty of the assessor "to exact" from each person a statement under oath, setting forth specifically all his real and personal property, etc. (§ 3629.) And section 3633 provides:—

"If any person after demand made by the assessor, neglects or refuses to give under oath the statement herein provided for, or to comply with the other requirements of this title, the assessor must note the refusal on the assessment book, opposite his name, and must make an estimate of the value of the property of such person; and the value so fixed by the assessor must not be reduced by the board of supervisors."

There is no finding in the transcript that the assessor demanded or attempted to exact from defendant the statement mentioned in section 3629, or that defendant neglected or refused to give under oath the statement "after demand made by the assessor."

Moreover, the statute provides the penalties for a failure to furnish the statement after demand made by the assessor. *First*, the person refusing to make the statement is liable to pay one hundred dollars. (Pol. Code, § 3682.) *Second*, he is deprived of the right to have reduced the valuation placed upon his property by the assessor prior to the adjournment of the county board of equalization. (Pol. Code, § 3633.) That such is the meaning of section 3633, is apparent from the language therein employed. The last clause declares "the value so fixed by the assessor must not be reduced by the board of supervisors," and clearly indicates the valuation referred must be made before the adjournment of the board as a board of equalization.

We are not authorized to add any third consequence as resulting from the failure to furnish a list of property, even where a list or statement has been demanded by the assessor, *a fortiori* (under the pretense of imposing a third and distinct penalty upon a failure to furnish the statement of property), to vitalize

and render operative a provision of the statute clearly violative of the Constitution.

Neither *City and County of San Francisco v. Flood*, 64 Cal. 504, nor *Orena v. Sherman*, 61 Cal. 101, is in conflict with the views above expressed. In both the assessment was made by the assessor prior to the meeting of the county board of equalization. In *Orena v. Sherman*, it appeared that the assessor had entered in his assessment book that the party assessed had refused to furnish a statement of his property, and thereby declared and determined that demand had been made, and the list refused.

Judgment reversed.

MORRISON, C. J., MCKEE, J. SHARPSTEIN, J., and ROSS, J., concurred.

MYRICK, J., and THORNTON, J., dissented.

Rehearing denied.

[No. 9846. In Bank.—October 30, 1885.]

THE PEOPLE EX REL. M. R. LEVERSON ET AL., PETITIONERS, v. THOMAS L. THOMPSON, SECRETARY OF STATE, RESPONDENT.

ELECTION—MEMBERS OF CONGRESS—EFFECT OF CERTAIN STATUTES—PROCLAMATION BY THE GOVERNOR.—The relators claimed to have been elected representatives in Congress at the general election in 1884. Their claim was based on the alleged invalidity of the Act of March 13, 1883, dividing the State into congressional districts, and repealing all acts in conflict therewith. Only a few votes were received by them, and these were cast in pursuance of the Act of March 30, 1872, relating to the same subject as the Act of 1883, and within the repealing clause of the latter act. No proclamation was issued by the governor for an election in accordance with the Act of 1872. *Held*, that the claim of the relators, conceding the invalidity of the Act of 1883, could not be sustained.

APPLICATION for a writ of mandate. The facts are sufficiently stated in the head-note and opinion of the court.

Attorney-General Marshall, M. R. Leverson, and George W. Chamberlain, for Petitioners.

H. G. Platt, Amicus Curiae, contra.

MCKINSTRY, J.—The petitioners are not entitled to a mandate directing the secretary of State to certify to the governor that two of them were duly elected Congressmen-at-large, and that each of the others was elected a member of the House of Representatives, in a congressional district created by the Act of the legislature of 1872.

If it should be conceded that the Act of 1883 is invalid, because of non-compliance by the legislature with certain formalities required by the Constitution, yet, as appears from the petition and facts of which we take judicial notice, the electors throughout the State did not vote for two members of Congress at large, nor did the electors within the limits of each of the congressional districts, as prescribed by the Act of 1872, vote for a member of Congress to represent the people of such district.

Notice to the electors lies at the foundation of any popular system of government. It has sometimes been held that the existence of a law fixing the time of an election, and the offices to be filled, is of itself notice. It may be conceded that when a term of office is to expire at a certain date after a general election (no other election to intervene), the electors take notice the office is to be filled at such general election. Some decisions have gone so far. But it is well settled that when a vacancy has occurred by reason of death or resignation, the voters are not bound to take notice of such vacancy, and the casting of votes for a candidate or candidates to fill the vacancy does not constitute an election. The facts of the present case bring it within the principle of the decisions which hold that, in cases of special elections to fill a vacancy, a proclamation is necessary, even although the special election be held at the same time as a general election. The principle is that a notice by proclamation is necessary whenever the voters are not bound by law to take notice of the time of the election and of the officers then to be chosen.

The contrary not being averred in the petition it must be presumed that the governor, who had approved the Act of 1883, issued his proclamation for the election of a member of Congress in each of the districts defined by that act.

The general rule is that all are bound to know the law. But the recognition of this general rule does not compel us to hold, that the electors, as matter of fact, knew that the Act of 1883 was of no force or effect. It does not compel us to hold that, as matter of law, the electors throughout the State were bound to know (under penalty of disfranchisement) that a statute regular in form, certified to have been properly passed by the appropriate officers, published as other statutes are published, approved by the governor and by him acted under when he issued his proclamation, was *void*, because of matters not appearing on the face of the statute, but which could be ascertained only by an examination of the journals of the two houses of the legislature; that, thus taking notice of the invalidity of the Act of 1883, the electors were bound to know that the law of 1872 was still in full force and operation.

That the electors did not know all it is claimed they ought to have known, is apparent from the matters set forth in the petition, and from the fact that the petitioners have found it necessary to ask that the secretary of State be prohibited from estimating the votes cast for members of the House of Representatives of the United States in the respective districts created, or attempted to be created, by the Act of 1883.

Courts of justice in this State take judicial notice, perhaps, of the contents of the journals of the two houses of the legislature; the citizens at large are not required to take legal notice of the entries of the journals. The people had not actually been notified of such entries when the election was held. They had before them (let us assume) the Statute of 1883, approved by the governor, and published as statutes are required to be published, and the governor's proclamation. We are asked to decide that all the voters should have inquired whether the statute was invalid by reason of matters of which they had not been notified. That the duty was imposed upon them to make investigation into the history in the legislature of the bill, for the Act of 1883; to consider questions as to the validity of the law arising out of the proceedings in the legislature which preceded its final passage; to determine such questions *correctly*, or as petitioners claim they should be determined (questions it may be difficult of solution by the courts with the aid of counsel learned in the

law), and then to vote for officers not mentioned in the governor's proclamation, in districts not defined in the law so as aforesaid to be mentally determined to be invalid, and not recognized as continuing in existence by the executive or other officers of the State. Thus to decide, would be a formal acknowledgment by this court of results which cannot be treated as an intelligent and binding expression of the voice of the people, and which are entirely beyond any consequence legitimately derivative from the maxim that all are supposed to know the law.

Whether anybody else was or was not elected to the House of Representatives of the United States, at the general election, we are quite certain that the petitioners were not.

Writ denied and petition dismissed.

MORRISON, C. J., THORNTON, J., and MCKEE, J., concurred.

ROSS, J., concurring.—I concur in the main, in the views expressed by MR. JUSTICE MCKINSTRY. I wish to add that, in my opinion, the Act of 1883 is a constitutional and valid law.

Section 15 of article iv. of the present Constitution provides: "No law shall be passed except by bill. Nor shall any bill be put upon its final passage until the same, with the amendments thereto, shall have been printed for the use of the members, nor shall any bill become a law unless the same be read on three several days in each House, unless, in case of urgency, two thirds of the House where such bill may be pending shall, by a vote of ayes and noes, dispense with this provision. Any bill may originate in either House, but may be amended or rejected by the other; and on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nays upon each bill separately, and shall be entered on the journal; and no bill shall become a law without a concurrence of a majority of the members elected to each House."

It is earnestly insisted by the petitioners for the writ that under this provision of the Constitution, it is requisite to the validity of a bill that each and every amendment thereto should have been read on three several days in each House. It is very certain that the Constitution does not so provide in terms. The provision with respect to the passage of bills is extremely explicit. Express authority is given for the amendment of any bill in

either House, and it is expressly declared that no bill shall be put upon its final passage until the same, *with the amendments thereto*, shall have been printed for the use of the members. If it had been intended to provide that, except in case of urgency, no bill shall become a law unless the same, *with the amendments thereto*, be read on three several days in each House, it would have been an easy matter to have said so. The insertion of the words "with the amendments thereto," in the first clause and their omission from the second, is, to my mind, very strong evidence that the clause from which they were omitted was not intended to apply to them.

In *Miller v. The State*, 3 Ohio St. 479, it appeared that a bill originally introduced in the Senate, after being read twice, and on different days, was committed to a select committee, who reported it back with one amendment, to wit: "Strike out all after the enacting clause and insert a new bill"; that on a subsequent day, April 12th, this amendment, after being itself amended, was agreed to, and the bill as amended, ordered to be engrossed and read a third time to-morrow; that on the morrow (April 13th) it was "read the third time" and passed, and having afterward passed the House, and been duly enrolled, was signed by the presiding officers of the two Houses, filed in the proper office, and published among the laws. The Constitution of the State then provided that "every bill shall be fully and distinctly read on three different days, unless in case of urgency, three fourths of the House in which it shall be pending shall dispense with this rule."

In that case it was claimed, as it is claimed here, that the amendment was in fact a "new bill," and that it was only read once, and, therefore, invalid under the constitutional provision quoted. In the course of the opinion the court, speaking through Judge Thurman, said: "But for argument's sake, let it be admitted that the bill as amended was read but once in the Senate; is the act for that reason void? That, counting the two readings before the amendment and the final reading, the bill was read three times, is conceded, for these readings are shown by the journal, and it is also conceded that, in general, three readings of an amendment are not necessary. But, inasmuch as the amendment in this case is styled in the journal a 'new bill,'

it is said that three readings were necessary. Why necessary? The amendment was none the less an amendment because of the name given it. It is not unusual in parliamentary proceedings to amend a bill upon striking out all after the enacting clause and inserting a new bill. (Jefferson's Manual, § 35.) When the subject or proposition of the bill is thereby wholly changed, it would seem to be proper to read the amended bill three times, and on different days; but when there is no such vital alteration, three readings of the amendment are not required."

What is here said by the learned judge covers both points made by the petitioners, for apart from their claim that every amendment must be read in each House on three several days, it is contended that the purported amendment to the bill in question was in fact no amendment but a new bill. The original bill was, one to divide the State of California into congressional districts, and the amendment adopted did but change the lines of the districts as fixed in the original bill. "The subject or proposition of the bill" was not at all changed. When that is done, the bill as amended should undoubtedly, as observed by Judge Thurman, be read on three several days, for it then becomes in effect a new bill; but not so, when there is no such vital alteration.

In the case of *The People v. Wallace*, 70 Ill. 680, the Supreme Court of that State held that the constitutional provision of the State requiring bills to be read on three several days before their passage did not apply to amendments, the court saying: "It is also objected that the tenth section of the act was not constitutionally adopted because it was engrafted as an amendment whilst the bill was being considered, and was not read on three several days in the House adopting it as an amendment. We are clearly of opinion that the requirement does not apply to an amendment, and the objection cannot prevail." (See also *McCulloch v. The State*, 11 Ind. 434, 435.) Nothing here said conflicts with the decision in *Weil v. Kenfield*, 54 Cal. 111, of the correctness of which I have no question.

MYRICK, J., concurring.—For the reasons given in the opinion of MR. JUSTICE ROSS, I am of the opinion that the Act of 1883 is constitutional and valid. I therefore concur in the judgment.

[No. 8479. Department One.—October 31, 1885.]

SEXTUS SHEARER, APPELLANT, v. THE CITY OF OAKLAND, RESPONDENT.

JUSTICES OF THE PEACE—SECTION 103 OF THE ACT OF APRIL 1, 1880, CONSTRUED.—Section 103 of the Act of April 1, 1880, amending the Code of Civil Procedure, applies to justices of the peace elected at the general State election of 1879, as well as to those subsequently elected.

APPEAL from a judgment of the Superior Court of Alameda County.

This was an action to recover salary for services alleged to have been performed by the plaintiff as justice of the peace of the city of Oakland. The remaining facts sufficiently appear in the opinion of the court.

Sextus Shearer, and *J. G. McCallum*, for Appellant.

J. M. Poston, and *John Yule*, for Respondent.

The COURT.—The demurrer to the complaint was sustained by the court below on the ground that section 103 of the act, entitled “an act to amend part 1 of the Code of Civil Procedure, and each and every title, chapter, article, and section of said part 1, and substituting a new part 1 to take the place thereof in said Code, relating to courts of justice and various officers connected therewith,” approved April 1, 1880, was only intended to apply to such justices of the peace as should be elected after it took effect. In this we think the court was in error. There is nothing in the language of the act indicating such intention, and that the legislature in enacting it had in mind the justices of the peace elected at the general State election of 1879, of which the plaintiff was one, is shown by section 110, which reads: “The term of office of justices of the peace shall be two years from the 1st day of January next succeeding their election; *provided*, that all justices of the peace elected at the general State election of 1879 shall go out of office at the end of one year from the 1st day of January, 1880.” In our opinion, the provisions of the Act of April 1, 1880, applied, from its taking effect, as well to such justices of the peace elected at the general election in 1879 as to those elected subsequently.

Judgment reversed and cause remanded with directions to the court below to overrule the demurrer to the complaint.

Hearing in Bank denied.

[No. 8415. Department One.—October 31, 1885.]

THE GRANGERS' BUSINESS ASSOCIATION OF
CALIFORNIA, RESPONDENT, v. JOHN W. CLARK, AP-
PELLANT.

CORPORATION—MORTGAGE—ESTOPPEL.—In an action by a corporation to foreclose a mortgage given by the defendant for money loaned to him by the corporation, the defendant is estopped to deny the regularity of the organization of the corporation and its power to enter into the contract.

APPEAL from an order of the Superior Court of the county of Alameda granting a new trial.

The facts are stated in the opinion of the court.

Mich. Mullany, for Appellant.

Estee & Wilson, for Respondent, cited 1 Jones on Mortgages 683; *Franklin v. Twogood*, 18 Iowa, 515; *Bradley v. Bradley*, 53 Ill. 413; *Main v. Casserly*, 67 Cal. 127.

Ross, J.—The plaintiff loaned the defendant a certain sum of money, in consideration of which defendant executed to the plaintiff his certain promissory note, together with a mortgage upon certain property, to secure its payment; and this action by the plaintiff to foreclose the mortgage is resisted by defendant upon the alleged grounds (1) of irregularities in the organization of the plaintiff corporation, and (2) of the want of power on plaintiff's part to enter into the contract.

Upon established principles of equity, appellant's mouth is closed in respect to both points. (Sedgwick Stat. and Const. Law, 73; Bigelow on Estoppel, p. 424; Morawitz Priv. Corporations, § 100.)

Order affirmed.

MCKEE, J., and MCKINSTRY, J., concurred.

[No. 8890. In Bank.—October 31, 1885.]

J. P. SWEENEY ET AL., RESPONDENTS, v. LELAND
STANFORD, APPELLANT.

PARTNERSHIP—PLEADING—FICTITIOUS NAME—CERTIFICATE.—The plaintiffs were partners doing business under a designation which did not show the names of the partners. This fact appearing on the face of the complaint, it was alleged that the plaintiffs had filed a certificate as required by section 2468 of the Civil Code. The complaint counted upon a contract made by them in their partnership name. The allegation as to the filing of the certificate was denied by the answer, and the certificate given in evidence did not comply with the statute. *Held*, that the allegation was essential to the sufficiency of the complaint, and that the plaintiffs could not recover without proving it.

ID.—WHEN FAILURE TO FILE CERTIFICATE A DEFENSE.—If the facts alleged in the complaint do not bring the case within the provisions of the statute requiring a certificate, the failure to file it is only available by setting it up in the answer as a defense to the action.

ID.—ABATEMENT OF ACTION.—The effect of failing to file a certificate when required is merely to abate the action. After complying with the statute, a new action may be brought.

APPEAL from a judgment of the Superior Court of the city and county of San Francisco, and from an order refusing a new trial.

The action was brought on an account for the price of goods sold and delivered. The remaining facts are stated in the head-notes and opinion of the court.

H. S. Brown, and J. E. Foulds, for Appellant.

Edward P. Cole, for Respondents.

ROSS, J.—By statute in this State every partnership except commercial and banking partnerships established and transacting business in a place without the United States, transacting business in the State under a fictitious name, or a designation not showing the names of the persons interested as partners in such business, is required to file with the clerk of the county in which its principal place of business is situated, a certificate signed by the partners and acknowledged before some officer authorized to take the acknowledgment of conveyances of real property, stating the names in full of all the members of such partnership and their places of residence, and publish the same once a week, for

four successive weeks, in a newspaper published in the county, if there be one, and if there be none in such county, then in a newspaper published in an adjoining county. (Civ. Code, §§ 2466, 2467.) By a subsequent section—2468—it is provided that “persons doing business as partners contrary to the provisions of this article shall not maintain any action upon or on account of any contracts made or transactions had in their partnership name, in any court of this State, until they have first filed the certificate and made the publication herein required.” This is statute law, is very plain and must be given effect.

The complaint in the present case shows that the plaintiffs are partners under a designation not showing the names of the persons interested as partners, and counts upon a contract made in their partnership name. The statute in terms declares that persons thus doing business shall not maintain an action upon such a contract unless they shall have filed the certificate required by the section cited. Manifestly, therefore, *with the averments in respect to the partnership and the contract*, the complaint would have been demurrable had it failed to have alleged compliance with the condition imposed by the statute as a prerequisite to the maintenance of the action. And being, under such circumstances, a necessary averment, it was, of course, necessary for the plaintiffs to prove a substantial compliance with the condition, the allegation in that regard being denied in the answer. (*Fabian v. Callahan*, 56 Cal. 161.) Of course where the complaint fails to disclose that the plaintiffs fall within the provisions of section 2466 of the Civil Code, to avail the defendant the failure to file the required certificate must be set up in the answer as a defense to the action. In either case the action would only abate, and would not be a bar to another action brought after compliance with the provisions of the statute. (*Byers v. Bourret*, 64 Cal. 73.)

It results from what has been said that as there was a failure on the part of the plaintiffs to show a compliance with the statute in regard to the certificate of partnership, the court below should have granted the defendant's motion for judgment of nonsuit.

Judgment and order reversed and cause remanded for a new trial.

MORRISON, C. J., MCKINSTRY, J., THORNTON, J., MYRICK, J., and MCKEE, J., concurred.

[No. 9705. In Bank.—November 12, 1885.]

IN THE MATTER OF THE ESTATE OF ROBERT
B. SWAIN, DECEASED.

ESTATE OF DECEASED PERSON—PRESENTATION OF CLAIMS NOT DUE.—

All claims against the estate of a deceased person, whether due or not, stand upon the same footing as to the time of presenting the same for allowance.

Id.—DEFECTIVE VERIFICATION.—The allowance of certain claims defectively verified sustained in a subsequent contest by the heirs.

Id.—ACCOUNT STATED.—A balance struck upon an account may be presented as a claim against an estate without specifying the items or particulars of the account.

Id.—ALLOWANCE—BURDEN OF PROOF.—Where claims have been allowed as presented, the presumption is that they were allowed upon vouchers and proofs satisfactory to the administrator and the court, and although the heirs may contest the allowance, the burden of proof is cast upon them.

APPEAL from an order and decree of the Superior Court of the city and county of San Francisco settling and allowing the final account of an administrator, and directing the payment of certain claims.

The facts are stated in the opinion of the court.

W. C. Burnett, and *R. W. Hent*, for Appellant.

Cobb & Moore, *Winans & Belknap*, *Edward J. Pringle*, *Henry C. McPike*, *Clement*, *Osment & Clement*, *George A. Nourse*, and *M. B. Blake*, for Respondents.

MCKEE, J.—In this proceeding the Superior Court of the city and county of San Francisco, sitting as a court of probate, upon the settlement of the final account of the administrator of the estate of R. B. Swain, deceased, decreed the allowance and partial payment of certain claims against the estate, which having been allowed by the administrator and approved by the

probate judge, were duly filed. The claims thus allowed and ordered paid amounted to \$60,000. Three of them were contested at the final settlement. The first of these claims is as follows:—

1. "Estate of R. B. Swain, deceased, 1871, to John Boardman.
Dr.:—

April 8th—To balance of account as rendered this date	\$4,498 32
November 6th—To cash received this date as per account	2,104 66
February 17, 1883—To interest on \$4,498.32 from April 8, 1871, to June 14, 1872, at 1½ per cent per month	811 57
February 17th—To interest on \$2,104.66, from November, 1871 to June 14, 1872, at 1½ per cent per month	192 92
	\$7,607 47"

The second:—

2. "The estate of R. B. Swain, deceased. To Cartwright, Harrison & Co., Dr.:—

For balance of account due this day as per statement hereunto annexed	\$6,751 79
R. B. Swain, Esq., in account current and interest to December 31, 1871, with Cartwright, Harrison & Co., 1871:—	
January 1st—To balance of account rendered.....	\$6,310 16
December 30th—Interest to 31st inst.....	\$441 71
Less your portion of balance of interest account 29 at 28 per cent.....	08 — 441 63
E. E.	\$6,751 79

"New York, January 2, 1872."

3. And the third was a claim in favor of Mudge, Sawyer & Co., based upon fourteen promissory notes, each of which was dated 17th of May, 1869, and made payable at New York to the order of R. B. Swain—the first being payable on the 1st of December, 1872, and each of the others, six months after its preceding note became due—the last being payable on the 1st of June, 1879.

The claims were presented to the administrator in 1873, within due time after the publication of notice to creditors of the estate. Publication was made as required by section 1490 of the Code of Civil Procedure, by the administrator in the year 1872.

At that time every holder of a claim against the estate of a decedent was required by law to exhibit the same, verified by affidavit, to the administrator within legal time after publication of notice to creditors for that purpose. The law required that the affidavit upon which to make presentation of the claim must be made "by the claimant himself, or some one in his behalf." If made by a person other than the claimant, it was required of him to set forth in the affidavit the reason why the affidavit was not made by the claimant, and to state "that the amount of the claim was justly due; that no payments had been made thereon which were not credited, and that there were no offsets to the same to the knowledge of the claimants or affiant."

None of the claimants verified the contested claims by their affidavits. Each affidavit was made by persons other than the claimants, who describe themselves as "agents and attorneys of the claimants." The affidavit to the claim of Mudge, Sawyer & Co., substantially conforms to the law under which it was made. But thirteen of the promissory notes upon which the claim is founded, were not due at the time of the presentation of the claim to the administrator, and it is contended that the claim was non-presentable, and that the administrator had no authority to allow it.

At that time the law was as it is now, that when a person died intestate all his property, real and personal, without any distinction between them, was chargeable with the payment of his debts (§ 1358, Civ. Code; § 1516, Code Civ. Proc.); and it was made the duty of his administrator to ascertain the amount of claims outstanding against the estate for which it might be liable, so as to provide for their payment out of the assets of the estate. For that purpose the law required that *all claims* against the decedent, due or not due, should be made known to the administrator by exhibiting them to him verified by the necessary affidavit so that he could pass upon their genuineness and validity by allowance or rejection. Upon ascertaining in that way the amount of the liability of the estate the law then cast upon the

administrator the duty to report the condition of the estate, "designating the names of the creditors, the nature of each claim, when it became due, or *when it will become due*, and whether it has been allowed or rejected." (§ 1512, Code Civ. Proc.)

If the claim was allowed and approved, the allowance *prima facie*, established its validity against the estate. If it was due and rejected, the claimant was required to establish its validity by suit upon it within three months after rejection, or *if it was not due*, then within two months *after it became due* (§ 1498, Code Civ. Proc.); and if its validity was established by recovery thereon, the judgment entitled the claimant to rank as a creditor of the estate and to payment in due course of administration, or if the administrator allowed the claim although not due, it entitled the claimant to rank in the same way, and upon deducting a rebate of interest upon the claim, entitled him to payment of the principal sum, or to share in a distribution of the estate *pari passu* with creditors whose allowed claims were due. (§ 1648, Code Civ. Proc.)

From these provisions of the Code law, as it was at the time of the presentation of these claims, it is manifest, that *all* claims against a decedent's estate, whether due or not due, could be presented to the administrator within legal time after publication of notice to creditors; and if they were not so presented the law declared them "forever barred." We are, therefore, of opinion that although the promissory notes were not due when the claim based upon them was presented to the administrator of the estate in question, it was under the law presentable and allowable as a valid claim against the estate. No interest upon it was demanded, and upon the settlement of the administrator's final account it was properly adjudged to be a valid claim for the principal of the notes.

The next contention is, that the statement of each of the other claims is insufficient to constitute a cause of action, or of claim, against the estate; that the statement of each is also ambiguous and unintelligible, and that the claims themselves were not authenticated according to law.

The affidavits verifying these claims were irregular. Each was made by a person other than the claimant, styling himself as "agent and attorney of the claimant." In one, no reason is

stated why the affidavit was not made by the claimant. In neither does the affiant state that there were no payments or offsets to the claim, except what is credited *to his own knowledge*; although it is stated that there were no payments or offsets against the claims to the knowledge of the claimants. These omissions made the verifications of the claims defective.

And the statement of each claim is not free from ambiguity. Each is founded upon an alleged balance due on an account current, in which interest, at a higher rate than is legally allowable in matters of account, is computed on the debit and credit sides of the account, according to some commercial rule of computation which does not appear in the statement.

But although neither of the claims was verified in all particulars as required by law, and the statement of each is not as clear as it might have been, we think each was substantially sufficient for presentation and allowance under the law.

The term "claim," as used in connection with the estates of deceased persons, has reference, says Mr. Justice Field, in *Fallon v. Butler*, 21 Cal. 25, to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal actions for the recovery of money, and upon which a money judgment could have been rendered.

A balance struck upon an account between parties is such a demand as would constitute a sufficient cause of action. A suit, brought upon such a cause of action against Swain in his lifetime would, therefore, have been maintainable, and the statement of such a cause of action in the complaint would have been sufficient to support a judgment against him. Being sufficient for the maintenance of an action against the decedent in his lifetime, it would also be sufficient after his death, for the presentation of it to his administrator, if properly verified, as a claim against his estate.

As the subject of a suit, if the statement of the cause of action upon the account was deemed objectionable, defective, or insufficient, the defendant in the action would have had the right to demand a bill of particulars of the items of the account which were to be proved. And as the subject-matter of a claim presented to his administrator, he also had the right to demand

a bill of particulars or "vouchers and proofs" of the account. (§ 1494, Code Civ. Proc.)

Both claims were allowed and approved as presented, and the presumption is that they were allowed upon "vouchers and proofs" to the satisfaction of the administrator and the probate judge, as to the principal and interest due on the accounts. Interest is recoverable upon a balance of indebtedness founded on money transactions, or upon an account between parties from the time the amount is ascertained by them. In the absence of an agreement in writing to pay more than lawful interest, the legal rate only ought to be allowed; but there may have been proof of an agreement in writing to pay the higher rate charged on one side of the account and credited on the other side.

In law the allowance of the claims, although made upon defective verifications, was not void. It was a judicial act, which entitled the claims to rank as acknowledged debts of the estate to be paid in due course of administration; but as a judicial act in their favor it was not binding and conclusive against the heirs, because they were not parties to it. They had therefore the right to question the allowance at the settlement of the estate. The burden of showing the invalidity of the allowance was, however, cast upon them. (*Estate of Loshe*, 62 Cal. 413; *Estate of Crosby*, 55 Cal. 579; *Estate of Schroeder*, 46 Cal. 318.)

The heirs in this case did question the allowance and approval of the claims. But in the contest which was made the claimants, by affirmative proof, established the validity of the claims, and the court upon that hearing adjudged them to be valid. There was no exception taken to the evidence given in the contest; nor is there any specification in the record of any particular in which the evidence was insufficient to justify the decision and judgment of the court, nor is there any specification of errors in law, occurring at the trial, to which exceptions were taken by the contestants.

The evidence is therefore not reviewable; and as we find no errors of law apparent upon the record, the judgment and order appealed from must be affirmed.

It is so ordered.

MORRISON, C. J., ROSS, J., MYRICK, J., and MCKINSTRY, J., concurred.

[No. 11151. Department Two.—November 17, 1885.]

IN THE MATTER OF THE GUARDIANSHIP OF LAURA
DANNEKER, A MINOR.

GUARDIANSHIP—JURISDICTION—CONFLICT.—A petition for letters of guardianship of a minor was filed in the Superior Court of the city and county of San Francisco, stating that the minor was a resident of such city and county, but was temporarily at school in Alameda County. A citation was issued and served upon all the parties interested requiring them to appear and show cause why the petition should not be granted. Before the day fixed for the return of the citation, one of the parties on whom it had been served applied to the Superior Court of Alameda County for letters of guardianship of the minor, which were issued to him, the fact of the previous application not being brought to the knowledge of the court. *Held*, that as the Superior Court of the city and county of San Francisco had jurisdiction to hear and determine the question of the residence of the minor, the need of the guardian, and the propriety of appointing the petitioner, it could not be deprived of this jurisdiction by the subsequent proceedings in the Superior Court of Alameda County.

APPLICATION for a writ of prohibition. The facts are stated in the opinion of the court.

Chas. P. Goff, and *Robt. Ferral*, for Petitioner.

A. H. Loughborough, for Respondent.

MYRICK, J.—Application for a writ of prohibition to the Superior Court of the city and county of San Francisco, Department Nine.

On the 19th of June, 1885, one Teresa McGee presented her petition to the said Superior Court of the city and county of San Francisco, in which she averred that some six years ago Mrs. Danneker, a widow, the mother of the said Laura, placed the child under her care as Superioress of St. Joseph's Orphan Asylum in said city and county; that afterward the mother died leaving no estate except \$170, which had been expended in the maintenance of said Laura and two other of her minor children; that after the death of the mother the petitioner placed the said Laura under the care of a Mrs. Trendle, who agreed to support and raise her under her personal care; that afterward Mrs. Trendle, without the knowledge of petitioner, gave the custody of the child to Jacob Michelson, who had ever since had the custody of her, and that she was then at a boarding-school in Alameda County, kept by Mrs. Kegler; that said

child was then nine years of age, a full orphan, and had no property and no guardian; that said Michelson and Mrs. Trendle and the said child were residents of said city and county, though the child was temporarily at a school in Alameda County; and the petitioner prayed that letters of guardianship be issued to her.

The Superior Court made an order that citation issue, returnable June 30th, and that it be served on the said minor and on Jacob Michelson, Mrs. Trendle, and Mrs. Kegler. The citation was duly served.

After the service of the citation, and on the 23d of June (the return day of the citation being June 30th), the said Michelson presented a petition to one of the judges of the Superior Court of Alameda County, in which he averred that said minor was a resident of Alameda County, under the care of Mrs. Kegler, and had no guardian, and prayed for letters of guardianship. The petition was signed by said Michelson and C. P. Goff as his attorney. In this petition no mention was made of the proceedings in the Superior Court of the city and county of San Francisco, and the judge in Alameda County not being informed thereof, made an order for service of citation, on Mrs. Kegler and Mrs. Trendle. On the return day, to wit, June 29th, after hearing evidence offered by Michelson, the court found that the minor resided in Alameda County, and granted the prayer of the petition of Michelson for letters. On the return day of the citation in the Superior Court of the city and county of San Francisco, to wit, June 30th, the said Michelson, by his attorney, filed objections to the petition of the said Teresa McGee, and the hearing was postponed until July 14th, on which day the said Michelson, by his said attorney, presented a certified copy of the proceedings in the Superior Court of Alameda County, and moved that the petition of said Teresa McGee be dismissed, on the ground that the court had no jurisdiction, letters having been already granted to him by the Superior Court of Alameda County. Further hearing was continued to July 23d, and before that day an alternative writ of prohibition herein was granted, and an order to show cause made.

There is no doubt that at the time the said Teresa McGee presented her petition to the Superior Court of the city and

county of San Francisco, and citation was served on Michelson and the others, that court had jurisdiction to hear and determine whether the minor was a resident of that city and county, and required a guardian, and whether the said Teresa was a proper person to be appointed. The question, then, is presented, could Michelson (instead of presenting the issue of residence and the other subjects involved to the Superior Court of the city and county of San Francisco), step over to Alameda County, obtain letters there, and thus oust the former court of jurisdiction to proceed? We think not. It is proper to presume that the Superior Court of Alameda County will, when its attention is brought to the fact that a petition was first filed in the city and county of San Francisco, revoke its order of appointment and recall its letters, to the end that there may be no conflict of jurisdiction. It is apparent there cannot be two guardianships in two different courts at the same time. Letters will be issued, if necessary, by the court of the county where it may be legally determined the child resides.

Further than this, it is not necessary to go at the present time, except to suggest if Mr. Michelson and his attorney, C. P. Goff, did, as is stated in some of the papers herein, resort to the court in Alameda County for letters, instead of meeting the question in the court in San Francisco, as a trick, it was a hazardous proceeding; for as to Mr. Michelson, by section 1209 of the Code of Civil Procedure, it is declared to be a contempt to practice "deceit or abuse of the process or proceedings of the court by a party to an action or special proceeding"; and as to Mr. Goff, by section 282 of the Code of Civil Procedure, he was forbidden to seek to mislead a judge by artifice.

We do not intend to prejudge the proceedings taken by either one; we desire merely to call attention to the risk that may have been run. When Mr. Michelson filed his petition in Alameda County, he had already been served with citation to appear before the Superior Court of the city and county of San Francisco, which court then had, as to him, jurisdiction to hear and determine.

The application for the writ is denied, and the order heretofore made is vacated.

MORRISON, C. J., and THORNTON, J., concurred.

[No. 20106. Department One.—November 19, 1885.]

THE PEOPLE, RESPONDENT, v. LEW ROBERTSON,
APPELLANT.

CRIMINAL LAW—MURDER—EVIDENCE.—The evidence examined, and *held* sufficient to sustain a verdict of murder in the second degree.

ID.—SELF-DEFENSE.—Where the killing occurred during an assault upon the defendant brought about by his own misconduct, he must, in order to justify the killing as an act of self-defense, have really and in good faith endeavored to decline any further struggle before the act was committed, provided he could do so with safety.

ID.—INSTRUCTIONS.—The rulings upon certain instructions approved.

ID.—WITNESSES—WHO TO BE PRODUCED BY PROSECUTION.—The court below denied a motion made the defendant after the prosecution had rested, for an order requiring the prosecution to call and examine as witnesses certain persons who were shown by the testimony of one of the witnesses for the prosecution to have been present at the time of the homicide. *Held*, no error.

APPEAL from a judgment of the Superior Court of the county of Mendocino, and from an order refusing a new trial.

The facts are stated in the head-notes and the opinion of the court.

J. A. Cooper, J. Q. White, and J. M. Mannon, for Appellant.

The verdict is not supported by the evidence. (Pen. Code, § 187; *People v. Clark*, 7 N. Y. 392; *Darry v. The People*, 10 N. Y. 120.) It was error in the court not to compel the prosecution to call those persons who were present at the homicide. (*Territory v. Hanna*, 5 Mont. 284; *Hurd v. The People*, 25 Mich. 415; *Maher v. The People*, 10 Mich. 226; Roscoe's Criminal Evidence, p. 135; *Weller v. The People*, 30 Mich. 23; Wharton's Criminal Evidence, § 448.)

Attorney-General Marshall, for Respondent.

McKEE, J.—Defendant was convicted of murder in the second degree and sentenced to ten years in the State prison. On this appeal from the judgment and an order denying a motion for a new trial, it is contended:—

1. That the verdict is not supported by the evidence.

The evidence shows that defendant, on the 24th of August, 1884, twice stabbed one A. Davis with a butcher knife. In one of the stabs the knife was driven into his body, between the fifth

and sixth ribs, upwards and forward toward the heart, the point of the knife penetrating the heart, causing almost immediate death. The stabbing was done in the excitement of an angry quarrel and scuffle, which originated in an attempt by the defendant and two others to buy a watermelon at a store in the town of Covelo, kept by the wife of Davis. Davis himself was in charge of the store at the time, and when the parties asked him to sell them a watermelon on credit, he told them he had no watermelons to sell on credit, and to go along about their business. They did not leave. Defendant refused to go, saying he would do as he pleased, and commenced to abuse Davis with opprobrious and threatening language. In these circumstances, Davis picked up an iron-hooked stick, six or seven feet long, which was used in the store for bringing down buckets and things from hooks on which they hung, and with the end of the stick he "poked and punched" the defendant, who fell on the porch of the store. The defendant got up, and instead of going away turned upon Davis, who was standing inside the store, and Davis again used the stick to "punch" him, but the defendant got hold of the stick, and Davis, in trying to jerk it away from him, jerked him inside the store, where, in the struggle over the stick, defendant continued to curse and swear at Davis, and threatened to kill him. In these circumstances the wife of Davis stepped in between the two, and ordered her husband to go to the back part of the store, and the defendant to go away. But neither let go the stick, and the defendant struck at Davis, past the woman, cutting one of her fingers in the act. The blow caused Davis to stagger and cry out that he was cut. In the act of staggering he let go the stick and picked up an ax-handle, which he raised as in the act to strike, when the defendant closed with him, stabbed him again and shoved him against a showcase on the counter of the store, where he fell and died with the defendant atop of him. Defendant immediately arose from the body, walked out of the store and across the street to a saloon where, as a witness expresses it, "he laid right upon a card-table in the saloon, turned one leg upon it and pulled out his knife, on the blade of which there was blood all the way up to the hilt, and said, 'I have been spaying, or slaying, the s— of a b——.'"

In his own behalf the defendant testified: "Deceased got mad about something I said about the melon, and jumped down and got this rod and called me a d—— s—— of a b——, and punched at me with one end of the rod. He then turned the rod and punched at me with the other end and knocked me down. While I was getting up he got an ax-handle and hit me; the second time he hit me I caught the handle and he jerked me inside the store; he jerked away from me in the store and started to hit me again with it. I ran in under him then and cut him. As soon as I could get him to let loose of me I walked right out and went over to Mr. Montague's. He hit me in the stomach with the stick and knocked me down on my back."

This evidence, it is argued, proves that the killing was done in the heat of blood, upon provocation, and without malice, and that it amounted to manslaughter only, and not murder.

But the conduct of the defendant in connection with the homicide, his persistent threats to kill Davis, the use of a deadly weapon in killing him, and his bravado immediately after the killing, are things which do imply malice in them. Their sufficiency as evidence to prove the existence of malice was matter for the consideration of the jury; and as the jury found from them that the defendant unlawfully killed the deceased in malice, and not in the heat of passion caused by the assault made upon him by the deceased, it cannot be said, as matter of law, that the evidence was insufficient to support their verdict.

The mere fact that the deceased and defendant were in actual combat at the time of the homicide does not of itself mitigate the homicide or justify or excuse it. Justification or excuse for taking human life must arise out of the circumstances in which the killing took place, as proved by the testimony on the part of the prosecution or of the defendant. And it is well settled, if the circumstances show that a person, armed with a deadly weapon, on being assaulted, takes advantage of the assault made upon him to kill his assailant, and does, in execution of his purpose, kill him, not in the heat of passion caused by the assault, nor in reasonable defense of himself against the assault, it is murder. (2 Bish. Crim. Law, 736.)

It is also well settled that if the circumstances of a combat following an assault show that from the outset the words and

acts of the defendant indicated an intention to kill, or to take his assailant at an unfair advantage to kill him under the color of the assault, it is murder. (1 Russell on Crimes, pp. 527, 532, 585, 592; 2 Wharton on Criminal Law, §§ 953, 955, 987, 996.)

2. The next assignment of error is that the court instructed the jury as follows:—

“Before the defendant can claim that he was acting in self-defense it must appear that the defendant must really and in good faith have endeavored to decline any further struggle before the homicide was committed. And in this case, if you believe from the evidence that the defendant was engaged in mortal combat with Davis, the deceased, and that the defendant did not really and in good faith endeavor to decline any further struggle before the homicide was committed, if one were committed, then, and in such case, the defendant cannot avail himself of the plea of self-defense.”

The proposition is, that if a person is assaulted by another, with whom he engages in a combat, he must really and in good faith endeavor to decline any further struggle before taking the life of his assailant.

According to the common law it is the duty of a person assaulted to give way “as far as the fierceness of the assault will permit him.” (1 Hale, P. C. 483.) But if the assault be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm, then, in his defense, he may kill his assailant instantly; and this, says Blackstone, “is the doctrine of universal justice as well as of the municipal law.” (4 Blackst. Com. p. 185.)

Upon that principle are founded the provisions of our Penal Code on the same subject. Section 197 of the Code in effect declares: That if a person is assaulted in such a way as to give him ground as a reasonably prudent man in the condition in which the assault places him to apprehend a design on the part of the assailant to commit a felony upon him, or to do him some great bodily harm, he has the right instantly to defend himself, and, if necessary to prevent such real or apparent danger to his person, to kill his assailant. Real or apparent danger, or danger imminent and immediate to life or limb, is therefore a sufficient condition in which to exercise the right of self-defense.

No withdrawal or retreat is required. So assailed a person has a right to stand his ground, and, if necessary in defense of himself, slay his assailant. But necessity, real or apparent, for taking human life, arising out of the circumstances in which the homicide is committed, must exist, and the person himself must be without fault.

"The weight of authority," says the Supreme Court of Indiana, "establishes the doctrine that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." (*Runyon v. The State*, 57 Ind. 84; 1 Bish. Crim. Law, § 865.)

In this case, according to the evidence, the defendant was not conducting himself lawfully. He should have left the store when he was told to go. He had no right to remain and abuse the person in charge of the same with opprobrious epithets and threats to kill. Being where he had no right to be and doing what he had no right to do, he was not without fault when Davis assailed him in order to compel him to go away. Nor did the nature of the assault upon him endanger his life or limb. There was no time, from the commencement of the affray to the time of the stabbing, when he could not have withdrawn without danger. That being so, the necessity for taking the life of his assailant did not exist, except by his own creation; for when he got up from the porch where he had fallen, he could have gone away out of danger; but he turned upon Davis, and engaging him in a struggle over the stick with which Davis had been prodding him, forced him inside the store and killed him. When a killing takes place under such circumstances, it is true, as matter of law, that the slayer should, really and in good faith, have endeavored to decline any further struggle before the homicide was committed. (Pen Code, sub. 3, § 197.)

3. The giving of the following instruction to the jury is also assigned as error:—

"If the jury believe from the evidence that there was first an affray on the porch of the store, and that the deceased pushed the defendant down with the iron hook, and that then the deceased returned to the store, and the affray then ceased for a

sufficient length of time for reason to have resumed its sway, and the defendant had sufficient time to realize the situation before anything further was done by the contending parties, and that then the defendant went into the store and there attacked the deceased, and then killed him as charged in the information, and not in necessary self-defense, then I charge you that the defendant was not justifiable in inflicting the mortal blow."

It is said there was no evidence of a cessation of hostilities. But it does appear that when the defendant fell on the porch Davis did not continue the assault upon him; there was therefore a pause in the combat, and to that phase of the case the instruction was applicable.

4. The refusal to give the ninth instruction, in a series of instructions which the defendant asked, did not prejudice the defendant, because the matter to which it related was substantially covered by the eighth instruction which the court had given to the jury at the defendant's request.

5. There was no error in the denial of a motion made by the defendant after the prosecution rested, to order the prosecution to call and examine as witnesses in the case certain persons who were said to have been present at the time of the homicide.

Besides, the same persons were afterwards called and examined as witnesses by the defendant.

We find no prejudicial error in the record.

Judgment and order affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

[No. 8791. Department One.—November 19, 1885.]

GEORGE W. DENT, APPELLANT, v. GEORGE BIRD
ET AL., RESPONDENTS.

DEED—CONSTRUCTION—PAROL EVIDENCE.—In an action to quiet title, the defendants offered in evidence a deed which purported to convey a tract of land including the premises in controversy, but contained no mention of the quantity of land embraced therein. The plaintiff objected to the introduction of the deed, and to sustain his objection offered to prove by parol that at the time the deed was executed, the tract was supposed to contain a less quantity of land than it actually did, and that the deed was not intended to convey the land in controversy. *Held*, that the evidence offered by the plaintiff did not go to the admissibility of the deed, but to its effect, and that the terms of the deed could not be varied or contradicted by such evidence.

APPEAL from a judgment of the Superior Court of the county of Alameda, and from an order refusing a new trial.

Action to quiet title. The remaining facts are stated in the opinion of the court.

John T. Humphreys, and *Geo. W. Tyler*, for Appellant.

B. S. Brooks, *George Leviston*, *Mastick*, *Belcher & Mastick*, and *Greathouse & Blanding*, for Respondents.

ROSS, J.—The subject of this controversy is a part of that portion of the Rancho San Antonio, situated in what is now the county of Alameda, which was confirmed and patented by the United States government to Antonio Maria Peralta, under whom both plaintiff and defendants claim title, defendants through a deed executed by Peralta on the 23d of October, 1851, to William A. Chipman and Gideon Aughinbaugh, and plaintiff, by virtue of a deed executed by Peralta on April 8, 1868, to George W. Dent and Thomas Wallace. At the time of the deed to Chipman and Aughinbaugh, Peralta's title rested upon the grant from the Mexican government, but its subsequent confirmation and patent by the government of the United States inured to the benefit of his grantees, and determined as well the validity of the grant as its boundaries. Admittedly, the land in dispute, which is marsh land, is within the patented lines, so that the real question in the case is whether it falls within the descriptive calls of the deed to Chipman and Aughinbaugh. The description

is: "All that tract or parcel of land situated in the township of San Antonio, and in the county of Contra Costa, and known by the name of Bolsa or Peninsula del Encinal, being part of the Rancho de San Antonio, and property of A. M. Peralta, granted, etc. . . . Said Encinal is almost all surrounded by the sea water, having a single entrance or mouth on the north-east side. Said mouth or entrance is to be fenced and gated by said parties of the second part immediately (upon) taking possession, from the point or end of the San Leandro Slough, or Estero de San Leandro, to the point or end of San Antonio Slough, or Estero de San Antonio, a distance from point to point of about 1,000 yards, more or less, and said line for the fence run about 300 yards from the brick-yard house with the purpose of preventing the entrance of the cattle of said A. M. Peralta, and of his heirs, executors, or assigns, and for not doing so, said William W. Chipman and G. Aughinbaugh, their heirs or assigns, are bound to pay all damages unto said A. M. Peralta, his heirs, executors, or assigns."

Plaintiff's counsel objected to the introduction of this deed when offered by defendants, "upon the ground that it did not include the lands described in the complaint, as by its terms it only purported to convey the part of the bolsa or peninsula covered with oak timber, and in this connection offered to prove the following facts:—

"*First*—That at the time of the execution of the said deed, and prior thereto, it was supposed by the grantor and grantees of said deed that there was about 2,200 acres of high land upon the peninsula.

"*Second*—That shortly after said deed was executed, the grantees of said deed, in conveying one fourteenth of their interest, spoke of the amount as 140 acres of land, more or less.

"*Third*—That at the time of the execution of said deed, and prior thereto, it was understood by the grantor and grantees of said deed, and by all other persons in the neighborhood, when speaking of the 'Bolsa de Encinal,' that the high land, or land covered with oaks, only was meant, and not the salt marsh or tide lands on the peninsula.

"*Fourth*—That once in every twenty-four hours, and at high water large, the waters of the ocean came up within twenty feet

of the line between the firm land and the salt marsh and tide land on the south line of the land described in the complaint, along the line of segregation between the high land and the salt marsh and tide lands of the peninsula referred to and shown in defendant's Exhibit 'A,' and that has been so at all times from 1850 down to the present day.

"*Fifth* — That the high lands on the peninsula or bolsa were at the time of the execution of said deed, excepting a strip along the north side of the high land of about 300 feet wide, covered with oak trees, resembling a grove from a distance.

"*Sixth* — That the high land of the peninsula at the time of the execution of said deed was about 1,994 acres.

"*Seventh* — That the whole land on the peninsula, high land and salt marsh and tide land at that time, was something over 3,300 acres.

"*Eighth* — That all the land described in the complaint was salt marsh and tide land."

The defendants objected to each and all of the foregoing proofs as offered by plaintiff.

As is well said for respondents, the matters offered to be proved by the plaintiff would not go to the admissibility of the deed, but at most to its effect. For this reason the court below was right in overruling the objection to the introduction of the deed.

But treating the offer to prove the matters enumerated as made in rebuttal, the judgment should not be disturbed if the admission of such proof as was offered could not have affected the result. Parol evidence is never permitted to vary or contradict the terms of a written conveyance. While evidence is admissible of all the circumstances surrounding the maker of the instrument, parol evidence of other language, declaring his meaning, than that which is contained in the instrument itself, is not admissible. (1 Greenl. Ev. §§ 169, 287, 288.) If, therefore, the language of the deed in question is unambiguous and admits of but one construction, it is obvious that no parol proof could be material to its construction.

It is said for the plaintiff that the deed by its terms only purported to convey the part of the bolsa or peninsula covered with oak timber. Clearly this is not so, for the deed in terms declares: "Said Encinal (that is, the Encinal previously referred to

therein as the Bolsa or Peninsula del Encinal) is almost all surrounded by the sea water, having a single entrance or mouth on the northeast side." The grantor having thus expressly declared in his written conveyance that the Bolsa or Peninsula del Encinal "is almost all surrounded by the sea water, having a single entrance on the northeast side," it is very clear that to permit parol proof, that at the time of the execution of the instrument he understood when speaking of the Bolsa del Encinal "that the high land or land covered with oaks only was meant," would be to permit the written instrument to be varied and contradicted by parol. *A fortiori*, as against the written declaration of the grantor, would the understanding of "all other persons in the neighborhood" be inadmissible.

But the intention of the grantor to convey by the deed all of the Bolsa or Peninsula del Encinal is, if possible, made still more manifest by the further provision contained in the deed that "said mouth or entrance is to be fenced and gated by said parties of the second part immediately (upon) taking possession, from the point or end of the San Leandro Slough or Estero de San Leandro, to the point or end of San Antonio Slough, or Estero de San Antonio, a distance from point to point of 1,000 yards, more or less, and said line for the fence (to) run about 300 yards from the brick-yard house, with the purpose of preventing the entrance of the cattle of said A. M. Peralta, and of his heirs, executors, or assigns, and for not doing so, said William W. Chipman and G. Aughinbaugh, their heirs or assigns, are bound to pay all damages," etc.

Nothing can be clearer we think from the language of the deed than that the land conveyed had for its boundaries the sea water and the line about 300 yards from the brick-yard house, and extending from the point or end of the San Leandro Slough to the point or end of San Antonio Slough.

In respect to the offered proof of quantity, it is sufficient to say that the deed contains no mention whatever of the quantity of land in the tract conveyed.

In our opinion there was no error in the ruling of the court below and therefore the judgment and order are affirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

[No. 8658. Department One.—November 19, 1885.]

J. H. TAYLOR, RESPONDENT, v. S. A. MIDDLETON,
APPELLANT.

MINING CLAIM—ABANDONMENT—QUESTION FOR JURY.—In an action of ejectment to recover a mining claim, it is for the jury to determine whether a location which the evidence tends to show was made prior to that attempted by the plaintiff has been forfeited or abandoned.

ID.—LOCATION.—The marking of a mining location must be such that the boundaries of the claim can be readily traced, and whether or not the marking conforms to this requirement is a question for the jury.

ID.—CONSTRUCTION OF PLEADINGS.—The construction of the pleadings is the duty of the court, and it is error to instruct the jury in such a manner as to leave it for them to determine whether or not the answer denies certain allegations of the complaint.

ID.—FACT ADMITTED.—The ouster of the plaintiff being admitted by the answer, it is error to instruct the jury that the question of ouster is one of the issues to be tried by them.

APPEAL from a judgment of the Superior Court of Mono County, and from an order refusing a new trial.

The facts are stated in the opinion of the court.

Bennett & Reddy, for Appellant.

Kittrell & Owen, and *R. M. Clarke*, for Respondent.

ROSS, J. — This is an action of ejectment to recover a mining claim. It seems that the ground was originally located by one Neal, and called the Neal Mine. The plaintiff claims to have subsequently relocated it on the 1st of January, 1881, under the name of the Permelia Mine. The instructions of the court to the jury were erroneous in several particulars.

1. The evidence tended show a location of the ground in question by Neal prior to the attempted location by the plaintiff. Whether or not such location by Neal, if made, was abandoned or forfeited prior to the plaintiff's attempted location on the 1st of January, 1881, was a question for the jury to determine. If at the date mentioned it remained a valid, subsisting location, the ground was not open to location by the plaintiff or any one else. The third and fifth instructions given by the court below were, therefore, erroneous.

2. The court further instructed the jury "that a monument of stone two feet high, placed in the center of the location, with

a notice of location placed thereon, and a similar monument of stone or a stake at the center of each end of the location, and a similar monument or stake at each corner of the location, are a sufficient marking of the location on the ground, and constitute a valid location of a mining claim." That depends on the condition of the ground to be located. If the conformation is such that monuments and stakes of the description given would so mark the boundaries as that they could be readily traced, they would be sufficient; otherwise not. But that was a question for the jury.

3. The court erred in instructing the jury as it did in the second instruction, that *if they should find* "that the defendant, in his answer, denies plaintiff's title, possession, and right of possession, and claims title, possession, and right of possession in himself, then as to the question of ouster, you are instructed to find for the plaintiff." The construction of the pleadings was a question for the court and not for the jury. The answer admitted the ouster, and the court therefore further erred in the first instruction in telling the jury that the question of the ouster of the plaintiff by the defendant was one of the issues to be tried by them.

Judgment and order reversed and cause remanded for a new trial.

McKINSTRY, J., and McKEE, J., concurred.

[No. 8469. Department One.—November 19, 1885.]

JONATHAN MYRES, APPELLANT, v. EDWARD SURRYHNE, RESPONDENT.

CONTRACT—SALE OF REAL ESTATE—COMMISSION—STATUTE OF FRAUDS.

An agent employed to exchange real estate cannot recover any compensation or commission for his services in that behalf unless the services were performed under a contract in writing subscribed by the principal.

APPEAL from a judgment of the Superior Court of the county of Alameda.

The facts are stated in the opinion of the court.

LXVII. CAL.—42

W. H. Allen, for Appellant.

Edward Lynch, for Respondent.

THE COURT. — The case arises out of an action to recover a reasonable compensation for services alleged to have been rendered by the plaintiff's assignor as a real estate agent, in bringing about an exchange of certain real properties for the defendant.

On the trial of the issue framed by the complaint and answer, plaintiff gave in evidence a book kept by the real estate agent, in which he or his clerk entered memoranda of real properties for sale or exchange. The book shows a memorandum which it was proved was furnished by the defendant and transcribed on the book by the clerk of the agent. The memorandum was as follows: —

“‘Exchange, Oakland property. \$25,000.’ In the margin, left hand margin, ‘block 690 and a part of block 511 and a part of block 527, with good improvements, nine houses, barn, coal yard, lumber yard, with all the fixtures necessary for a first-class business, with a mortgage of \$6,000; Brandon, agent. *Surryhne*, owner.’” Appended to this entry there was a diagram of the property showing the location of the blocks and the streets by which they were bounded.

It was not claimed, nor is it now, that this memorandum constituted a contract or a note, or memorandum of a contract for the payment of compensation or commission to the agent. But in connection with it the plaintiff asked of a witness “to state what services, if any, was performed by the agent in procuring an exchange of real estate between defendant and Mr. Tinson.” To that the defendant objected unless the plaintiff proposed to show a contract in writing between the defendant and the real estate agent for the alleged services. Upon an intimation by the court that the objection would be sustained, unless written authority was shown, plaintiff made the following offer: —

“We offer to prove that plaintiff's assignor was employed by defendant as stated in the complaint, to perform and did perform the services mentioned in the complaint; that in fact he did perform such services, and the value thereof was and is \$600; that there was no contract, agreement, or memorandum in writing

subscribed by defendant or his agent, employing or authorizing plaintiff's assignor to make such sale or exchange, or do or perform the acts specified in the complaint, other than said book." Defendant objected to the offer, and the court against plaintiff's exception sustained the objection, on the ground that there was no contract in writing subscribed by the defendant, as required by subdivision 6 of section 1624 of the Civil Code.

The ruling is sustained by *McCarty v. Loupe*, 62 Cal. 299; *Pacific Land and Trust Company v. Blockman*, 11 Pac. C. L. J. 24; and *Schuller v. Farquarson*, 5 West C. Rep. 583; and upon the authority of those cases the judgment appealed from is affirmed. Motion to dismiss appeal denied.

[No. 8816. Department One.—November 19, 1885.]

THE LAKE PLEASANTON WATER COMPANY,
APPELLANT, v. THE CONTRA COSTA WATER
COMPANY, RESPONDENT.

EMINENT DOMAIN—WATER COMPANY—RESERVOIR.—A corporation organized and existing under the laws of the State for the purpose of supplying the inhabitants of an incorporated city with pure fresh water, may exercise the right of eminent domain for the acquisition of land needed as a reservoir in connection with the purposes of its incorporation.

ID.—PRIOR APPROPRIATION—PLEADING.—In an action to condemn land for a public use, the complaint alleged that the defendant was a corporation organized under the laws of the State for a purpose similar to that of the plaintiff, and that it was the owner of the land sought to be condemned. *Held*, that inasmuch as the complaint contained no averment that the land in question had been appropriated to a public use, it was sufficient on demurrer without alleging that the land was required for a more necessary public use.

APPEAL from a judgment of the Superior Court of the county of Alameda.

The facts are stated in the opinion of the court.

J. E. McElrath, for Appellant.

Fox & Kellogg, and *Vrooman & Davis*, for Respondent.

Ross, J.—A demurrer to the amended complaint of the plaintiff having been sustained by the court below, and the

plaintiff having declined further to amend, judgment was entered for the defendant, from which the appeal is taken. The action is to condemn certain land of the defendant to be used by the plaintiff for the purpose of a reservoir in which to store water.

It is alleged in the complaint that the plaintiff is a corporation organized and existing under the laws of the State, for the purpose of supplying the inhabitants of the cities of San Francisco and Oakland with pure fresh water, and for the purpose of supplying water for manufacturing and irrigation.

It is contended on behalf of the defendant, that under the provision of the Code of Civil Procedure, by virtue of which the present proceedings are had, authority is not given to condemn land to be used as a reservoir in which to store or impound water. It is true, as said by counsel, that in the enumeration of the public uses found in section 1238 of the Code of Civil Procedure, in behalf of which it is declared the right of eminent domain may be exercised, the word "reservoir" is not found, but in classifying the estates and rights in lands subject to be taken for public use, it is provided by section 1239 of the Code, that a fee-simple may be taken when needed "for public buildings or grounds, or for permanent buildings, for reservoirs and dams, and permanent flooding occasioned thereby, or for an outlet for a flow, or a place for the deposit of debris or tailings of a mine."

The supplying of the inhabitants of an incorporated city with pure fresh water is by section 1238 declared to be a public use, in behalf of which the right of eminent domain may be exercised, and section 1239 provides in effect that the entire estate, in a given piece of land, may be taken when needed for a reservoir in behalf of such use.

Although the complaint alleges that the defendant is a corporation organized under the laws of the State, for the purpose of supplying the city of Oakland and its inhabitants with pure fresh water, and that defendant is the owner of the property sought to be taken, it is not averred that the property in question is used by defendant in supplying Oakland or its inhabitants with water, or that it is appropriated to any other public use. Therefore, the point made by respondent's counsel that property appropriated to public use cannot be taken unless for

a more necessary public use than that to which it has been already appropriated, cannot arise on the demurrer.

Judgment reversed and cause remanded with directions to the court below to overrule the demurrer to the amended complaint, with leave to defendant to answer.

MCKINSTRY, J., and MCKEE, J., concurred.

Hearing in Bank denied.

[No. 11262. Department One.—November 19, 1885.]

HERMAN HIRSCHFELD, PETITIONER, v. W. W. CROSS,
JUDGE OF THE SUPERIOR COURT OF TULARE COUNTY, RE-
SPONDENT.

ESTATE OF DECEASED PERSON—ACCOUNT—SETTLEMENT.—An administrator having presented his first annual account to the court, and pending its settlement, having filed a second account, the court, finding the first so defective that it could not properly be passed upon, ordered the administrator to file one account which should be full and complete up to the date of its rendition. *Held*, that the action of the court was proper.

APPLICATION for a writ of mandamus. The facts are stated in the opinion of the court.

Wal. J. Tuska, for Petitioner.

Stetson & Houghton, for Respondent.

ROSS, J. — This is an application for a writ of mandate to compel the respondent to enter an order settling an annual account of the petitioner as administrator of the estate of Allen E. Rose, deceased. It appears from the papers submitted that the petitioner was appointed administrator of the estate in question by the Superior Court of Kern County in the year 1880, and in the latter part of the following year filed his first account of his administration. This account was settled by the Superior Court, and from the order of settlement an appeal was taken to this court by the parties in interest, who were dissatisfied therewith. The appeal being heard, the order was reversed and the

cause remanded for further proceedings, which were had in the Superior Court and which resulted in another order of settlement, from which the contestants again appealed, and on the hearing of which appeal they were again successful, the order being reversed and cause remanded for further proceedings. After the cause went back the second time it was transferred by reason of the disqualification of the then superior judge of Kern County to the Superior Court of the county of Tulare, of which court the respondent herein is judge. And there the hearing of the account again came up, testimony was taken, and an opinion written and filed by the judge, reviewing the account, and directing an order to be drawn settling the account in accordance with the views expressed in the opinion. The judge's opinion was prepared without the benefit of the brief of the contestants, the latter having failed to reach him through some inadvertence, but subsequently, and before the making of the order settling the account, did do so, and in examining it the judge became satisfied that in some respects the opinion formed by him and expressed in writing was erroneous, and that the account as rendered was not sufficiently specific to enable the court properly to pass upon it. And as, pending the long and necessarily costly litigation over the first account, the administrator had filed a second one which had not been settled nor set down for settlement, and as by reason of errors in the first a further accounting was necessary, the court entered an order directing the administrator to present one account of his administration of the estate, which should be full and complete up to the time of its rendition. We think the court was right. If the first account was not sufficiently specific, the court clearly had the power to require the administrator to make it more specific. The Probate Court is the guardian of the estates of deceased persons and has control of the person appointed by it to administer the estate, subject to review as provided by law. It is its duty to require full and fair accounts on the part of administrators, and where the estate is so circumstanced as that one account will result in saving expense, and better and more clearly presenting the accounts of the representative of the estate, it is not only the right, but the duty of the court to require the one account. Of course upon its settlement, the administrator is entitled to a full hearing, and

if aggrieved by the settlement, has his appeal from the action of the Probate Court settling the account.

Writ denied and proceedings dismissed.

MCKEE, J., and MCKINSTRY, J., concurred.

[No. 8380. Department One.—November 19, 1885.]

THE OAKLAND GAS LIGHT COMPANY, RESPONDENT,
v. JAMES P. DAMERON ET AL. JAMES P. DAMERON,
APPELLANT.

PLEADING—STATUTE OF LIMITATIONS—FINDING.—The Statute of Limitations was pleaded by specifying certain sections of the Code of Civil Procedure as a bar to the action. The court found that the action was not barred by the statute or by the sections of the Code so specified. *Held*, that the finding was sufficient.

EJECTMENT—POSSESSION OF DEFENDANT—LANDLORD.—In an action of ejectment, where the possession is held by tenants, their landlord may be joined with them as a defendant.

ID.—CORPORATION—EVIDENCE.—In such an action, evidence that the plaintiff is a corporation *de facto* is admissible to establish the existence of the corporation as against the defendants.

APPEAL from a judgment of the Superior Court of the county of Alameda, and from an order refusing a new trial.

This was an action of ejectment. The remaining facts sufficiently appear in the head-notes and opinion of the court.

C. A. & C. Tuttle, and *J. P. Dameron*, for Appellant.

W. W. Foote, for Respondent.

MCKINSTRY, J.—It is urged by appellant that the court below did not find on the plea of the Statute of Limitations. The plea is that plaintiff's cause of action is barred by sections 315, 316, 318, and 332 of the Code of Civil Procedure. The finding is as broad and specific as the plea.

The defendant Dameron moved for a nonsuit on the ground that there was no evidence that he was in possession of the demanded premises when the suit was brought, or at any time. Section 379 of the Code of Civil Procedure provides: "In an action to . . . determine the right to the possession of real

property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant." There was evidence that the defendant Dameron was the landlord of the tenants in possession.

There was evidence that the plaintiff was a corporation *de facto*.

In this action such evidence was admissible, and established the existence of the corporation as against the defendants.

It is said by counsel for appellant that the vital question in the case is: Is the plaintiff entitled to recover the possession of marsh land which lies between the high and ordinary high tide? It has been adjudicated in the proceeding which resulted in the confirmation of the grant to Peralta, that the Mexican government granted to him the lands herein demanded. It has not been shown to our satisfaction that the Mexican government had no power to make the grant, even if it be conceded that the existence of such power was not determined by the adjudication referred to.

Judgment and order affirmed.

Ross, J., and McKee, J., concurred.

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2. ID.—OWNER MUST HAVE NOTICE OF ADVERSE CLAIM.—The owner has a right to be informed of the claim set up against him, either by acts or words, before the statute will run; and if the acts of the party in possession are of such a character as reasonably to indicate to the owner that the holdings is not adverse, but in subordination to the title, the statute will not run.—*Id.*

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ALIENS.

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ASSOCIATIONS (Continued).

written disposition was made by him, then to certain specified persons. It further provides that the payment should be deemed an absolute donation to the payee, free from all other claim or control. *Held*, that such donation formed no part of the estate of a deceased member, and that his personal representatives could not maintain an action to recover it.—*Swift v. San Francisco Stock and Exchange Board*, 567.

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ATTORNEYS AT LAW.

1. AUTHORITY TO PROSECUTE ACTION PRESUMED—DISMISSAL.—An action regularly instituted by an attorney is presumed to be with the consent of the plaintiff; and until his want of authority is established, the defendant cannot have the action dismissed by showing that the plaintiff does not desire to maintain it, the attorney opposing the dismissal.—*Boston Tunnel Company v. McKensie*, 485.
2. DUTIES.—On a review of the evidence, *held*, that the respondent was guilty of a breach of his duty as an attorney in appropriating to his own use money collected by him for his client.—*In re Treadwell*, 353.
3. ID.—DISBARMENT—CRIMINAL OFFENSE NOT NECESSARY.—In exercising the power of disbarment, the court deals with the attorney only as an officer of the court, investigating charges against him for the purpose of determining whether, under the proofs, he is a fit person to be allowed to continue to practice as an attorney and counselor in the courts under the license which has been granted to him, and not for the purpose of adjudging whether he is guilty of the commission of a crime for which he ought to be convicted and punished; and where an attorney has been found guilty in the practice of his profession of acts indicating moral depravity, he may be disbarred by the court without previous conviction of a criminal offense.—*Id.*

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BOND (Continued).

and qualify. He thereupon executed to the plaintiff a bond with sureties in the penal sum of \$10,000, to secure the safe-keeping and payment to it of all moneys that might come into his possession as secretary, and not paid out in the due course of business. The by-laws of the corporation authorized the board of directors to remove at pleasure all officers, and fix their terms of office. In June, 1882, Allen was re-elected, and the action was brought on the bond against him and his sureties to recover moneys alleged to have been misappropriated by him after his re-election. *Held*, that the action could not be maintained.—*Fresno Enterprise Company v. Allen*, 505.

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CONTEMPT (Continued).

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DEMAND — PLEADING — RELEASE — DECEIT — STATUTE OF LIMITATIONS.

— The complaint alleged that one C being the owner of certain stocks, deposited them with the defendants for safe-keeping, and authorized them to receive the dividends and pay the assessments thereon. Afterwards he demanded the stocks and the defendants refused to deliver them to him. After that he was induced by their false and fraudulent representations to execute and deliver to them a release of all his claims and demands against him. Subsequently he assigned the stocks and all his claims and demands against the defendants growing out of the fraud to the plaintiff, who thereupon demanded of the defendants the delivery of the stocks to him. *Held*, that the refusal of the defendants to deliver the stocks to C on his demand constituted a conversion, that the cause of action stated in the complaint was founded upon such conversion, and not upon the deceit of the defendants in procuring the release, and that the Statute of Limitations commenced to run from the time of the conversion. — *Doyle v. Callaghan*, 154.

CORPORATIONS.

1. **ELECTION OF DIRECTORS — ACTION TO SET ASIDE — WHO MAY MAINTAIN.** — A stockholder in a corporation may maintain an action to set aside an election of directors of the corporation, although at the time of the election no stock had stood in his name on the books of the corporation sufficiently long to entitle him to vote. — *Wright v. Central California Colony Water Company*, 532.

CORPORATIONS (Continued).

2. **ID. — JURISDICTION.** — The Superior Court has jurisdiction as a court of equity to inquire into the validity of such an election, and to set it aside if not made in conformity with law. — *Id.*
3. **ID. — MANNER OF VOTING.** — Every qualified stockholder present at an election has a right to vote at one time the number of shares owned by him for the whole number of directors to be elected, or to cumulate his shares upon one candidate, or to distribute them among as many candidates as he may see fit; and the corporation has no power to adopt any other mode of election. — *Id.*
4. **CONSOLIDATION OF RAILROADS — ARTICLES OF INCORPORATION.** — Under section 473 of the Civil Code, and section 40 of the Act of 1861, upon the consolidation of two railroad corporations, the articles of consolidation constitute the new articles of incorporation, and should be filed in the office of the secretary of State. — *California S. R. R. Co. v. S. P. R. R. Co.*, 59.
5. **HOW EXISTENCE PROVED.** — In an action by a corporation brought in the county in which its original articles of incorporation are filed, a copy certified by the secretary of State of the certified copy of such articles on file in his office is admissible in evidence to prove the organization of the corporation. — *Boston Tunnell Co. v. McKenzie*, 435.
6. **ID. — OFFICER — STOCKHOLDER — PAROL EVIDENCE.** — A question arose incidentally as to whether a witness for the corporation was an officer and stockholder. *Held*, that parol evidence was competent to prove the fact. — *Id.*
7. **MORTGAGE — ESTOPPEL.** — In an action by a corporation to foreclose a mortgage given by the defendant for money loaned to him by the corporation, the defendant is estopped to deny the regularity of the organization of the corporation and its power to enter into the contract. — *Grangers' Business Association of California v. Clark*, 634.
8. **PROMISSORY NOTE — ULTRA VIRES.** — A corporation is liable on its promissory note, the consideration of which it has received and retained, although the note was executed in pursuance of a contract *ultra vires*. — *Main v. Casserly*, 127.
9. **SWAMP LANDS — RECLAMATION DISTRICT — PUBLIC CORPORATION.** — A swamp land reclamation district is a public corporation for municipal purposes. — *People v. La Rue*, 526.
10. **ID. — DE FACTO CORPORATION — LEGALITY OF ITS ACTS.** — A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world, except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even as against the State, except in direct proceedings to arrest its usurpation of power, its acts are binding. — *Id.*
11. **ID. — REORGANIZATION — LEGALITY OF ORIGINAL DISTRICTS.** — Swamp land levee and reclamation districts *de facto*, acting as such in good faith and under an attempted compliance with the law, may, under section 3489 of the Political Code, be united, consolidated, and reorganized, so as to form a new corporation in all respects valid, and proceedings in the nature of *quo warranto* against such new corporation cannot be extended to an inquiry and determination as to the legality of the organization of the original districts. — *Id.*

CORPORATIONS (Continued).

12. **PRIVATE CORPORATION — POWER TO HOLD REAL ESTATE — PRESUMPTION.** — Every corporation is presumed to have power to purchase and hold real estate, and if there is anything in its charter, or the business in which it is engaged, or the law under which it is organized, abridging this power, it must be shown affirmatively. — *Id.*

See **BENEVOLENT SOCIETY**, 1; **BOND**; **CONTEMPT**, 1; **EJECTMENT**, 5; **EMINENT DOMAIN**; **MUNICIPAL CORPORATIONS**.

COSTS. See **APPEAL**, 3.

COUNSEL FEE. See **DIVORCE**, 3, 4, 6.

COUNTER-CLAIM. See **PLEADINGS**, 7-9.

COUNTIES.

1. **LIABILITY FOR INJURIES FROM DEFECTIVE BRIDGE.** — A *quasi* corporation, such as a county, is under no common-law obligation to repair highways, streets, or bridges within its limits; and even when the legislature enjoins such duty, a county is not liable to be sued for damages caused by a neglect to perform the duty, unless the action is expressly given by statute. Section 50 of the act, entitled "an act concerning roads and highways in Contra Costa County" — Stats. 1875-76, p. 237 — which makes the county "responsible for providing and keeping passable and in good repair, bridges and all public highways," does not create such a liability. — *Barnett v. Contra Costa County*, 77.
2. **MUNICIPAL CORPORATIONS — POWERS INVOLVING EXERCISE OF JUDGMENT CANNOT BE DELEGATED.** — Powers conferred upon a municipal corporation, involving the exercise of judgment and discretion, are in the nature of public trusts, and cannot be delegated to others. — *Scolley v. Butte County*, 249.
3. **ID. — BOARD OF SUPERVISORS — CONTRACT FOR COLLECTION OF DEBT DUE COUNTY — DELEGATION OF POWER TO CONDUCT LITIGATION.** — The board of supervisors of a county has power to contract for the collection of a debt due the county; but in the exercise of that power it has no authority to delegate to others, whom it employs for that purpose, the power to determine whether to commence a suit in the name of the county, and to retain attorneys to manage the prosecution thereof, nor to abdicate its control of such a suit, or make its compromise or settlement dependent upon the consent of strangers. — *Id.*
4. **CLAIMS AGAINST — MEALS FURNISHED PRISONERS — COMPENSATION — ACTION FOR.** — The sheriff of a county, if he is dissatisfied with the amount of compensation allowed him by the board of supervisors for meals furnished to prisoners confined in the county jail, may bring an action against the county for the amount which he claims to be reasonable. — *Fulkerth v. Stanislaus County*, 334.

See **MANDAMUS**, 1.

COUNTY GOVERNMENT ACT. See **PUBLIC OFFICERS**, 6.

COURTS. See **JUSTICES' COURTS**; **SUPREME COURT**.

COVENANT. See DEED, 12.

CRIMINAL LAW.

1. COMMITMENT — DESIGNATION OF OFFENSE — INFORMATION. — The district attorney in drawing up an information under section 809 of the Penal Code is not required to charge the offense designated by the committing magistrate in his indorsement on the depositions taken at the preliminary examination, but must charge the offense which is disclosed by the depositions themselves. — *People v. Vierra*, 231.
2. ONCE IN JEOPARDY — CONVICTION UNDER INSUFFICIENT INFORMATION. — An erroneous conviction under an information which failed to charge the defendant with the commission of any crime will not support a plea of former conviction or once in jeopardy. — *People v. Clark*, 99.
3. PRIOR CONVICTION — PRACTICE. — The defendant was accused by information of the crime of burglary, and was convicted of burglary in the first degree; and sentenced to fifteen years imprisonment in the State prison. The information contained a charge that the defendant had been previously convicted of petit larceny. To the latter charge the defendant was allowed to plead guilty, no evidence was introduced to prove the same, and no verdict rendered thereon. *Held*, that inasmuch as the defendant might have been sentenced to fifteen years in the State prison on the conviction of burglary in the first degree without reference to the prior conviction of petit larceny, the proceedings as to the prior conviction might be disregarded and the judgment allowed to stand. — *People v. Neason*, 225.
4. BURGLARY — EVIDENCE OF OWNERSHIP OF HOUSE — VARIANCE. — An information for burglary alleged that the crime was committed by entering the house of H. Wempe. A witness named G. Wempe testified that his father owned the house. No evidence of the owner's Christian name was given. *Held*, that the jury might presume that the name of the father of the witness was Wempe, and that he was in possession of the building, and that there was no variance between the information and the evidence. — *People v. McGilver*, 55.
5. *Id.* — EVIDENCE OF SUBSEQUENT OFFENSE. — On the trial of such offense evidence was given that at the time of the defendant's arrest he and an accomplice were attempting to commit another burglary, that burglary tools were found in the possession of the latter, and that articles stolen at the first robbery were found on the person of each. *Held*, that the evidence was admissible as tending to connect the parties with the first robbery. — *Id.*
6. ATTEMPT TO COMMIT BURGLARY — INFORMATION. — The crime of attempt to commit burglary is defined by statute, and an information which charges the offense in the language of the statute is sufficient. — *People v. Murray*, 103.
7. CONSPIRACY — ONE CONSPIRATOR MAY BE SEPARATELY PROSECUTED — INFORMATION. — In a prosecution for conspiracy, one conspirator may be separately informed against, tried, and convicted; and naming the co-conspirator does not render the information bad. — *People v. Richards*, 412.
8. *Id.* — CONSPIRACY TO ROB. — A conspiracy to compel a third person to sign a bank check, and then to take it from him by force, is a conspiracy to rob. — *Id.*
9. CONVICTION — INSUFFICIENCY OF EVIDENCE — LARCENY. — When the evidence is otherwise insufficient to justify the verdict, a conviction

CRIMINAL LAW (Continued).

- for larceny cannot be sustained by the mere fact that the defendant when a witness in his own behalf, made a false statement as to a matter in no way connected with the crime of which he was accused. — *People v. Wong Ah You*, 31.
10. DEGREES OF CRIME — GRAND LARCENY — VERDICT. — There are no degrees in the crime of grand larceny, and where an information charges the defendant with grand larceny in taking property from the person of another, a verdict of guilty is sufficient. — *People v. Price*, 350.
 11. PLEA OF GUILTY — WITHDRAWAL OF PLEA AFTER PUNISHMENT HAS BEEN FIXED. — In a prosecution for murder, the defendant, with the concurrence of his attorney and other persons of whom he sought advice, pleaded guilty. The court, after hearing evidence, determined the degree of the crime, and fixed the punishment at death. *Held*, that the defendant could not afterwards withdraw his plea and plead not guilty. — *People v. Lennox*, 113.
 12. *Id.* — WAIVER OF RIGHT TO JURY TRIAL. — In a criminal prosecution, a defendant, by pleading guilty, waives his right to a trial by jury. — *Id.*
 13. EVIDENCE — THREATS AGAINST BROTHER OF DECEASED. — On a trial for murder, threats made by the defendant against a person other than the deceased are admissible in evidence only under circumstances which show some connection with the injury inflicted on the deceased; and the fact that the person against whom the threats were made was the brother of the deceased and lived with him is sufficient to justify the admission of the evidence. — *People v. Bezy*, 223.
 14. *Id.* — CHARACTER OF DECEASED. — Evidence of the character of the deceased for peace and quietness is inadmissible against the defendant. — *Id.*
 15. *Id.* — PRACTICE — OPENING STATEMENT FOR DEFENDANT. — In his opening statement to the jury, counsel for the defendant may be restricted by the court to a statement of the facts which he expects to prove without any argument upon the same. — *Id.*
 16. MURDER — INSTRUCTION — PRESUMPTION AS TO INTENTION. — In a prosecution for murder, the court instructed the jury that "every person is presumed to intend what his acts indicate his intention to have been; and if the defendant fired a loaded pistol at the deceased and killed him, the law presumes that the defendant intended to kill the deceased; and unless the defendant can show that his intention was other than his act indicated, the law will not hold him guiltless." *Held*, that the instruction was proper. — *People v. Langton*, 427.
 17. *Id.* — DRUNKENNESS OF DEFENDANT. — As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry. — *Id.*
 18. MURDER — EVIDENCE. — The evidence examined, and *held* sufficient to sustain a verdict of murder in the second degree. — *People v. Robertson*, 646.
 19. *Id.* — SELF-DEFENSE. — Where the killing occurred during an assault upon the defendant brought about by his own misconduct, he must, in order to justify the killing as an act of self-defense, have really and in good faith endeavored to decline any further struggle before the act was committed, provided he could do so with safety. — *Id.*

CRIMINAL LAW (Continued).

20. **ID. — INSTRUCTIONS.** — The rulings upon certain instructions approved. — *Id.*
21. **ID. — WITNESSES — WHO TO BE PRODUCED BY PROSECUTION.** — The court below denied a motion made by the defendant after the prosecution had rested, for an order requiring the prosecution to call and examine as witnesses certain persons who were shown by the testimony of one of the witnesses for the prosecution to have been present at the time of the homicide. *Held*, no error. — *Id.*
22. **PERJURY — INSOLVENCY — FALSE VERIFICATION — OMISSION OF PROPERTY FROM SCHEDULE.** — A petitioner in insolvency is guilty of perjury in verifying his petition, schedule, and inventory in the form and manner prescribed by the Insolvent Act of April 16, 1880, if he wilfully omits from his schedule any of his property. The provision in the insolvent act making such omission a misdemeanor does not affect the statute against perjury. — *People v. Platt*, 21.
23. **ID. — INFORMATION — DESCRIPTION OF PROPERTY OMITTED.** — The information described the property alleged to have been omitted from the schedule as "consisting among other things of diamonds, watches, jewelry, money, and other personal effects belonging to him and his estate." *Held*, that the description was sufficiently definite and certain. — *Id.*
24. **RAPE — EVIDENCE — PARTICULARS OF COMPLAINT.** — On a trial for rape, the prosecutrix cannot give evidence of the particulars of a complaint made by her shortly after the assault. — *People v. Tierney*, 54.

See ATTORNEYS AT LAW, 3; INSTRUCTIONS, 1, 5, 6.

CROSS-COMPLAINT. See EJECTMENT, 2.

DAMAGES. See COUNTIES, 1; LIBEL, 1; MEASURE OF DAMAGES; MUNICIPAL CORPORATIONS; NEGLIGENCE, 3, 4; NUISANCE, 2; SURETYSHIP, 1; TRESPASS.

DEBTOR AND CREDITOR. See EXECUTION; INSOLVENCY; JOINT DEBTORS; MORTGAGE.

DECEIT. See CONVERSION.

DECISION. See FINDINGS; NEW TRIAL, 12, 13.

DEED.

1. **WHEN TAKES EFFECT — DELIVERY — INTENT.** — A written instrument in the form of a conveyance of land does not take effect as a deed until it is delivered with the intent that it shall so operate. — *Hibberd v. Smith*, 547.
2. **ID. — WHAT CONSTITUTES DELIVERY.** — What constitutes delivery is chiefly a question of fact, but a delivery is not complete until the grantor has so dealt with the instrument as to lose all control over it; and whether he has done so depends upon the intent to be deduced from all the surrounding circumstances. — *Id.*
3. **ID. — DELIVERY TO STRANGER — ASSENT OF GRANTEE — PRESUMPTION.** — The delivery of a deed to a stranger for the benefit of the grantee is deemed to be a constructive delivery to the latter only

DEED (Continued).

- when his assent thereto or facts which authorize a presumption of such assent are shown. — *Id.*
4. **ID. — WHEN NOT PRESUMED BENEFICIAL — CONSIDERATION.** — A deed purporting on its face to be executed for the consideration of \$5,000 will not be presumed beneficial to the grantee, in the absence of any evidence that the consideration has been paid. — *Id.*
 5. **ID. — JUDGMENT LIEN ACQUIRED BEFORE ASSENT OF GRANTEE.** — Where a deed presumptively beneficial to the grantee is delivered to a third person for his use, without his knowledge or prior authorization, the subsequent assent of the grantee to the delivery will not operate to defeat the lien of a judgment creditor of the grantor which attached to the premises sought to be conveyed after the date of the delivery and before the assent of the grantee. — *Id.*
 6. **FORM AND EFFECT — CONSIDERATION — HINDERING AND DELAYING CREDITORS — LEGAL TITLE.** — No consideration need be expressed in a deed of conveyance in order to give it effect, nor is it material that the deed was intended to hinder and delay creditors, so far as its sufficiency to pass the legal title is concerned. — *Goad v. Moulton*, 536.
 7. **CONSIDERATION MOVING FROM STRANGER — TRUST — PRESUMPTION — EVIDENCE.** — When a transfer of real property is made to one person, and the consideration is paid by or for another, the presumption of a trust in favor of the person by or for whom the payment is made may be rebutted by evidence showing a different intention between him and the grantee. — *Tryon v. Huntoon*, 325.
 8. **ID. — UNCERTAINTY OF DESCRIPTION.** — A deed describing the property intended to be conveyed as "three fractions of lot 7, J and K, Fourth and Fifth streets, Sacramento City," is void for uncertainty. — *Id.*
 9. **ID. — COLOR OF TITLE — POSSESSION — STATUTE OF LIMITATIONS.** — Such a deed is sufficient to give color of title, and possession under it for the requisite time will give a perfect title under the Statute of Limitations. — *Id.*
 10. **UNCERTAINTY OF DESCRIPTION — PATENT AMBIGUITY — PAROL EVIDENCE.** — A deed which shows upon its face that there are two lots to which the description equally applies is void for uncertainty, and parol evidence is inadmissible to explain the ambiguity. — *Brandon v. Leddy*, 43.
 11. **CONSTRUCTION — PAROL EVIDENCE.** — In an action to quiet title, the defendants offered in evidence a deed which purported to convey a tract of land including the premises in controversy, but contained no mention of the quantity of land embraced therein. The plaintiff objected to the introduction of the deed, and to sustain his objection offered to prove by parol that at the time the deed was executed, the tract was supposed to contain a less quantity of land than it actually did, and that the deed was not intended to convey the land in controversy. *Held*, that the evidence offered by the plaintiff did not go to the admissibility of the deed, but to its effect, and that the terms of the deed could not be varied or contradicted by such evidence. — *Dent v. Bird*, 652.
 12. **BREACH OF COVENANT — GRANT, BARGAIN, AND SALE.** — The defendants, by a deed of grant, bargain, and sale, conveyed certain land to the plaintiff, and expressly covenanted therein "to warrant and defend the premises against all persons lawfully claiming

DEED (Continued).

the same, by, through, or under them." At the time of the conveyance the grantor of the defendants was in possession of the premises, claiming that his deed to them, although absolute in form, was intended as a mortgage. He subsequently brought an action against the plaintiff and the defendants to redeem from such alleged mortgage. The plaintiff defended the action, and afterwards brought an action against him to recover possession of the premises. In both actions the plaintiff was successful. *Held*, that there had been no breach of either the express or implied covenants in the deed to the plaintiff. — *West v. Masson*, 169.

13. FILLING IN BLANK AFTER EXECUTION — LEGAL TITLE. — A deed in which the name of the grantee is left blank by the grantor at the time of its execution, and afterward inserted without his authority, does not convey any title, nor does it become sufficient for the purpose of passing the legal title from the fact that the grantee enters into possession and pays the purchase price. — *Arguello v. Bours*, 447.

See TAXATION, 4, 5; WILL.

DEFAULT. See JUDGMENT, 3; JUSTICES' COURTS, 3; VENDOR AND VENDEE, 4.

DEFENDANT. See APPEARANCE.

DELAY. See MEASURE OF DAMAGES, 3.

DELEGATION OF POWER. See COUNTIES, 2, 3.

DELIVERY. See DEED, 1-3, 5; SALE, 5.

DEMAND. See CONVERSION; ESTATES OF DECEASED PERSONS, 18.

DEMURRER.

1. PLEADING — GENERAL DEMURRER. — A general demurrer addressed to the whole of a complaint should be overruled if some portion of the complaint states a cause of action. — *Fleming v. Albeck*, 226.
2. PLEADING — DEMURRER TO PART OF A CAUSE OF ACTION. — A demurrer cannot be interposed to part of a cause of action or defense. If the part demurred to is irrelevant or immaterial, a motion to strike out may be made, but a demurrer must go to the whole cause of action or defense. — *Reed v. Drais*, 491.

See EMINENT DOMAIN, 2; FRAUD, 3; MANDAMUS, 2; PLEADINGS, 9.

DEPOSIT. See JUSTICES' COURTS, 4, 5.

DESCRIPTION. See CRIMINAL LAW, 23; DEED, 8-11; INSURANCE, 7; MINES AND MINING, 7, 8; MORTGAGE, 11.

DESERT LANDS. See PUBLIC LANDS, 2.

DETAINDER. See FORCIBLE DETAINDER.

DIRECTORS. See CORPORATIONS, 1-3.

DISBARMENT. See ATTORNEYS AT LAW, 3-5.

DISCHARGE. See INSOLVENCY, 6.

DISCRETION. See AMENDMENT, 1; COUNTIES, 2, 3; JUDGMENT, 3; NEW TRIAL, 2, 3; SAN FRANCISCO, 1.

DISMISSAL. See ATTORNEYS AT LAW, 1; DIVORCE, 6; JUDGMENT, 2; QUIETING TITLE, 1.

DIVISION FENCE. See BOUNDARIES; FENCES, 3, 4.

DIVORCE.

1. ACTION IN EQUITY — SUPREME COURT — JURISDICTION. — An action for divorce is a case in equity within the meaning of the clause of the Constitution conferring appellate jurisdiction on the Supreme Court. — *Sharon v. Sharon*, 185.
2. ID. — ACTION TO ESTABLISH MARRIAGE. — An action brought under section 78 of the Civil Code for the purpose of determining the validity of a disputed marriage is in its nature a suit in equity, and from the judgment therein an appeal lies to the Supreme Court. — *Id.*
3. ID. — ORDER FOR ALIMONY AND COUNSEL FEES APPEALABLE — FINAL JUDGMENT. — In an action for divorce, an order made *pendente lite*, for the payment by the husband to the wife of temporary alimony and counsel fees, is in effect a final judgment, and therefore appealable. Such an order cannot be reviewed on an appeal from the judgment decreeing a divorce. — *Id.*
4. ID. — STAYING PROCEEDINGS ON ORDER — SUFFICIENCY OF UNDERTAKING. — The order required the defendant to pay to the plaintiff, on or before the 9th day of March, 1885, the sum of \$7,500 as alimony, and thereafter the sum of \$2,500 monthly, until the further order of the court; it also required the defendant to pay the sum of \$55,000 as counsel fees. On appeal from the order, the defendant filed an undertaking to stay proceedings in the sum of \$305,000, being double the amount of the gross sums allowed for alimony and counsel fees, and double the amount of the monthly payments for the period of three years, assumed to be the period during which the appeal would probably be pending. *Held*, that the undertaking was sufficient to stay proceedings on the order pending the appeal. — *Id.*
5. CORROBORATIVE TESTIMONY. — In an action for divorce on the ground of extreme cruelty, the complaint alleged that the defendant had been guilty of cruel and inhuman treatment of the plaintiff, in that he had accused her of having committed adultery, and that in consequence of such accusations her mental suffering was so great that she became physically ill, and her health endangered. The only evidence in corroboration of the plaintiff's testimony was that of her attorney and another person in reference to statements made by the defendant in conversations of a friendly and confidential character, sought by the plaintiff's attorney with her knowledge, and with a view to settle matters between the parties, there being no evidence that the statements were made with any wanton or cruel

DIVORCE (Continued).

intent, or that they produced any effect upon the plaintiff. *Held*, that the testimony of the plaintiff was uncorroborated within the meaning of section 130 of the Civil Code. — *Haley v. Haley*, 24.

6. CONDONATION — DISMISSAL OF ACTION — PAYMENT OF WIFE'S COUNSEL FEES. — If, pending an action for divorce, the parties thereto admit a condonation, and ask that the action be dismissed, the court should order a dismissal, and thereafter the husband cannot be compelled to pay the counsel fees of the wife. — *Reynolds v. Reynolds*, 176.

DONATION. See ASSOCIATION.

DRUNKENNESS. See CRIMINAL LAW, 17.

EJECTMENT.

1. PROOF OF OUSTER — POSSESSION. — In an action of ejectment, an ouster by the defendant may be established without evidence that the land in dispute was enclosed so as to deprive the plaintiff of the possession thereof. Actual possession of land may be had without fences or enclosure. — *Sheldon v. Mull*, 299.
2. CROSS-COMPLAINT — SPECIFIC PERFORMANCE — FINDINGS — VERDICT. — In an action of ejectment, where the defendant files a cross-complaint for the specific performance of a parol contract for a lease of the land in controversy, the issues so raised constitute a case in equity, and the verdict of a jury thereon is merely advisory, and may be disregarded by the court. — *Haggin v. Raymond*, 302.
3. JURY TRIAL — TENANCY AT WILL — NONSUIT. — In an action of ejectment tried by a jury where one of the issues was as to whether the defendant was a tenant at will, the evidence on the subject being conflicting, *held*, that a nonsuit could not be granted on a ground which assumed the existence of the tenancy. — *Simpson v. Applegate*, 471.
4. POSSESSION OF DEFENDANT — LANDLORD. — In an action of ejectment, where the possession is held by tenants, their landlord may be joined with them as a defendant. — *Oakland Gas Light Co. v. Dameron*, 663.
5. ID. — CORPORATION — EVIDENCE. — In such an action, evidence that the plaintiff is a corporation *de facto* is admissible to establish the existence of the corporation as against the defendants. — *Id.*

See JUDGMENT, 4, 5; PLEADINGS, 8, 10.

ELECTION.

1. CONTEST — MISTAKE IN BALLOT. — Under the circumstances of the case, *held*, that the obvious intention of the electors to vote for the contestant for a certain office could not be defeated by a mistake of the printer in the description of the office in the ballots. — *Ingles v. Shepherd*, 460.
2. CONTEST — ILLEGAL BALLOT. — The court below rejected a ballot which did not conform in length and other minor respects to section 1191 of the Political Code. The ballot was only about eight inches and a half in length. *Held*, that the ballot was properly rejected. — *Reynolds v. Snow*, 497.
3. ERASURE. — In certain ballots the voters had erased with lead pencil marks the name of the contestant and also the name of the office to

ELECTION (Continued).

- be voted for, leaving simply the number indicating its order on the ballot, and opposite this number and erasure had written the name of the defendant. *Held*, that these ballots were properly counted for the defendant. — *Id.*
4. CONTEST — EVIDENCE — BALLOTS — BURDEN OF PROOF. — In an election contest the ballots are the primary and best evidence of the number of votes received by any candidate, provided they have not in any way been tampered with; and the burden of proof is upon the contestant to show that fact. — *Coglan v. Beard*, 303.
 5. ID. — CUSTODY OF BALLOTS BY CONTESTANT. — The ballots are not inadmissible in evidence by reason of the fact that for a short time they were in the possession of the contestant as *de facto* county clerk. — *Id.*
 6. ID. — STATEMENT OF COUNT ON ONE TRIAL AS EVIDENCE ON SECOND TRIAL. — A tabulated statement showing the result of the count by the judge on one trial is admissible in evidence on a subsequent trial for the purpose of showing whether or not the ballots had been tampered with between the dates of the trials. — *Id.*
 7. MEMBERS OF CONGRESS — EFFECT OF CERTAIN STATUTES — PROCLAMATION BY THE GOVERNOR. — The relators claimed to have been elected representatives in Congress at the general election in 1884. Their claim was based on the alleged invalidity of the Act of March 13, 1883, dividing the State into congressional districts, and repealing all acts in conflict therewith. Only a few votes were received by them, and these were cast in pursuance of the Act of March 30, 1872, relating to the same subject as the Act of 1883, and within the repealing clause of the latter act. No proclamation was issued by the governor for an election in accordance with the Act of 1872. *Held*, that the claim of the relators, conceding the invalidity of the Act of 1883, could not be sustained. — *People ex rel. Leverson v. Thompson*, 627.

See CORPORATIONS, 1-3; JUSTICES' COURTS.

EMINENT DOMAIN.

1. WATER COMPANY — RESERVOIR. — A corporation organized and existing under the laws of the State for the purpose of supplying the inhabitants of an incorporated city with pure fresh water, may exercise the right of eminent domain for the acquisition of land needed as a reservoir in connection with the purposes of its incorporation. — *Lake Pleasanton Water Co. v. Contra Costa Water Co.*, 659.
2. ID. — PRIOR APPROPRIATION — PLEADING. — In an action to condemn land for a public use, the complaint alleged that the defendant was a corporation organized under the laws of the State for a purpose similar to that of the plaintiff, and that it was the owner of the land sought to be condemned. *Held*, that inasmuch as the complaint contained no averment that the land in question had been appropriated to a public use, it was sufficient on demurrer without alleging that the land was required for a more necessary public use. — *Id.*
3. RAILROAD — RIGHT OF WAY. — In a proceeding to condemn land a railroad corporation, under section 465 of the Civil Code, has power to acquire a right of way in accordance with the most advantageous route for its road; and the taking for such purpose is not rendered unnecessary by the fact that it had previously purchased

EMINENT DOMAIN (Continued).

- a less advantageous right of way over the land of the defendant. — *Eel River and Eureka Railroad Company v. Field*, 429.
4. RAILROADS — RIGHT OF WAY — JOINDER OF PROCEEDINGS. — Under section 1244 of the Code of Civil Procedure a proceeding by a railroad corporation to acquire a right of way across the right of way of another railroad company, and a proceeding to acquire a right of way over lands which the defendant owns in fee, may be united. — *California Southern Railroad Company v. Southern Pacific Railroad Company*, 59.
 5. ID. — PLEADING — ALLEGATION OF TERMINI OF ROUTE. — The complaint, after stating the general route of the proposed road, alleged that the termini were to be National City and "a connection with the Atlantic and Pacific Railroad Company at or near the thirty-fourth parallel of north latitude in the State of California." *Held*, that the termini were alleged with sufficient certainty. — *Id.*
 6. ID. — IMPROVEMENTS — WHEN NOT INCLUDED IN COMPENSATION. — The value of improvements erected by the plaintiff on the land sought to be condemned, with the consent of the defendant, must not be considered in determining the compensation to be awarded for the land. — *Id.*
 7. ID. — MANNER OF CROSSING — QUESTION FOR JURY. — The question whether the manner of crossing is compatible with the greatest public benefit and least private injury, is one of fact to be determined with reference to the circumstances of the case. — *Id.*
 8. ID. — VERDICT — NEW TRIAL — JURY. — So far as the value of the property to be taken is concerned, the verdict of the jury is conclusive, although perhaps a new trial may be allowed by the court. All other issues of fact may be submitted to the jury. — *Id.*
 9. ID. — JUDGMENT — SIGNATURE BY JUDGE — ENTRY. — The judgment need not be signed by the judge. The presumption is that the judgment as entered by the clerk was authorized. — *Id.*
 10. ID. — FINAL JUDGMENT — FINAL ORDER OF CONDEMNATION — APPEAL. — In such proceedings the judgment on the assessment of damages, and adjudicating that the use is public, the taking necessary, etc., is the final judgment; the final order of condemnation is a special order made after final judgment, and an appeal therefrom must be taken within sixty days after its entry. — *Id.*
 11. ID. — COMPLAINT — VALUE OF PROPERTY. — The complaint need not allege the value of the property sought to be condemned. — *Id.*
 12. ID. — COST OF FENCES — WHEN NOT AN ELEMENT OF DAMAGE. — In the absence of circumstances making the cost of fences an element of damage, the provisions of the statute imposing on a railroad company the duty of fencing its road or to pay for fencing, do not affect the question as to the compensation to be paid for taking the land or imposing an easement upon it. — *Id.*

ENCLOSURE. See EJECTMENT, 1.

EQUALIZATION. See CONSTITUTIONAL LAW, 2; TAXATION, 10.

EQUITY. See BONA FIDE PURCHASER; CANCELLATION; CORPORATIONS, 2; DIVORCE, 1, 2; EJECTMENT, 2; INJUNCTION; JUDGMENT, 9; MISTAKE; NUISANCE, 4; PLEADINGS, 10, 11; QUIETING TITLE; TRUST.

ERASURE. See ELECTION, 3.

ESCHEATED ESTATE. See ALIENS.

ESTATES OF DECEASED PERSONS.

1. CITATION — SERVICE BY PUBLICATION. — A citation in probate proceedings must be served in the same manner as a summons in a civil action, and where the person to be served has departed from the State, service may be made by publication. — *Ashurst v. Fountain*, 18.
2. ACTION BY PERSONAL REPRESENTATIVE — DEFENDANT MAY TESTIFY. — In an action by the personal representative of a deceased person to enforce a demand due the estate of the decedent, the defendant is a competent witness as to transactions between himself and the decedent. — *McGregor v. Donnelly*, 149.
3. ACCOUNT — SETTLEMENT. — An administrator having presented his first annual account to the court, and pending its settlement, having filed a second account, the court, finding the first so defective that it could not properly be passed upon, ordered the administrator to file one account which should be full and complete up to the date of its rendition. *Held*, that the action of the court was proper. — *Hirschfeld v. Cross*, 661.
4. UNAUTHORIZED APPROPRIATION BY ADMINISTRATOR — CLAIM AGAINST ESTATE. — An unauthorized appropriation by an administrator of the funds of the estate cannot be made the basis of a claim by him against the estate. — *Estate of Hill*, 233.
5. ID. — ADMINISTRATOR CANNOT ACT UPON INDIVIDUAL CLAIM. — An administrator who is personally interested in a claim against the estate is disqualified from acting upon it. — *Id.*
6. ID. — MINOR HEIRS — CONSENT OF ATTORNEY TO PAYMENT OF CLAIM — ESTOPPEL. — The consent of an attorney appointed by the court to represent minor heirs, to a sale of real property for the purpose of paying a claim against the estate, does not estop such heirs from afterwards questioning the correctness of the claim upon an accounting by the administrator. — *Id.*
7. PRESENTATION OF CLAIMS NOT DUE. — All claims against the estate of a deceased person, whether due or not, stand upon the same footing as to the time of presenting the same for allowance. — *Estate of Swain*, 637.
8. ID. — DEFECTIVE VERIFICATION. — The allowance of certain claims defectively verified sustained in a subsequent contest by the heirs. — *Id.*
9. ID. — ACCOUNT STATED. — A balance struck upon an account may be presented as a claim against an estate without specifying the items or particulars of the account. — *Id.*
10. ID. — ALLOWANCE — BURDEN OF PROOF. — Where claims have been allowed as presented, the presumption is that they were allowed upon vouchers and proofs satisfactory to the administrator and the court, and although the heirs may contest the allowance, the burden of proof is cast upon them. — *Id.*
11. PRESENTATION OF CLAIMS. — Only such claims are required to be presented to the personal representative of a deceased person as when allowed will rank among the acknowledged debts of the estate to be paid in due course of administration. — *Hibernia Savings and Loan Society v. Conlin*, 178.
12. ID. — MORTGAGE TO SECURE DEBT OF ANOTHER — STATUTE OF LIMITATIONS. — Where a mortgage is given to secure the debt of a third person, and the mortgagor afterwards dies, the claim arising on the mortgage is not required to be presented to his personal rep-

ESTATES OF DECEASED PERSONS (Continued).

- representative, nor will its presentation and allowance affect the running of the Statute of Limitations against the mortgage. — *Id.*
13. **ID. — ACCRUING OF CAUSE OF ACTION.** — The doctrine of *Tynan v. Walker*, 35 Cal. 634, that the accruing of the cause of action and the running of the Statute of Limitations do not depend upon the existence of a person competent to sue, applied to the present case, the mortgagor having died before the mortgage debt became due. — *Id.*
 14. **REJECTION OF CLAIM — STATUTE OF LIMITATIONS.** — The period of three months within which an action upon a rejected claim against the estate of a deceased person must be brought under section 1498 of the Code of Civil Procedure does not commence to run until the actual rejection of the claim by an indorsement to that effect. — *Bank of Ukiah v. Shoemaker*, 147.
 15. **FAMILY ALLOWANCE — WHEN PROPERLY REFUSED.** — An order refusing a family allowance to the widow and children of deceased to whom a homestead consisting of farming land, and also some personal property, had already been set apart, will not be reversed where the petition for such allowance contains no statement that the proceeds of the farm are insufficient. — *Estate of Luther*, 319.
 16. **ADDITIONAL FAMILY ALLOWANCE.** — Where the family allowance previously granted to the widow of a deceased person for a limited period has been exhausted, the estate being solvent, she is entitled to such further allowance as is necessary for her maintenance during the progress of the settlement of the estate. — *Estate of Roberts*, 349.
 17. **ACTION TO RECOVER DISTRIBUTIVE SHARE — DEFENDANT INDIVIDUALLY LIABLE.** — An action to recover the amount distributed to the plaintiff by the decree of distribution in the estate of a decedent should be brought against the defendant individually, and not in his representative capacity. — *Melone v. Davis*, 279.
 18. **ID. — DEMAND NEED NOT BE ALLEGED.** — In such an action the complaint need not allege a demand on the defendant as executor or administrator. The action itself is a sufficient demand. — *Id.*
 19. **ID. — INTEREST — TAXES.** — An administrator who neglects to pay over to a distributee the amount awarded him by the decree of distribution, is liable for legal interest thereon from the time payment was ordered, and is not entitled to reimbursement for taxes subsequently paid by him on the distributive share. — *Id.*
 20. **FRAUDULENT SALE OF LAND BY EXECUTOR.** — Under section 1572 of the Code of Civil Procedure, one having an estate of inheritance in land fraudulently sold by an executor or administrator, may maintain an action against him to recover double the value of the land sold; but that section does not authorize an action against the sureties on his official bond. — *Weihe v. Statham*, 245.
 21. **ID. — NEGLECT OF EXECUTOR IN RELATION TO SALE — ACTION TO RECOVER FOR — ACTUAL DAMAGE — PLEADINGS.** — In an action under section 1571 of the Code of Civil Procedure, to recover on the bond of an executor or administrator, for his neglect or misconduct in the proceedings in relation to a sale of the real estate of the deceased, the complaint must show that the plaintiff has been actually damaged by the sale; and where the complaint contains no averments with respect to any proceedings in the Probate Court subsequent to the confirmation of the sale, and affirmatively shows that the land was sold for its full value, no damage is alleged,

ESTATES OF DECEASED PERSONS (Continued).

and the plaintiff will be left to his remedy in the Probate Court.
— *Id.*

22. PAYMENT OF UNLAWFUL CLAIM — ACTION ON BOND — ACCOUNTING. — The heirs of an intestate cannot maintain an action on the bond of an administrator to recover for a misappropriation of the funds of the estate until after an accounting has been had in the Probate Court, and the administrator has refused to pay the amount adjudged against him. — *Weihe v. Statham*, 84.

See ALIENS; APPEAL, 1; ASSOCIATIONS; SURETYSHIP, 4, 5; TRUST, 1, 5; WILL.

ESTOPPEL.

PLEADING. — A former recovery by the plaintiff operates by way of estoppel on the defendant, and cannot properly be pleaded. — *Wixson v. Devine*, 341.

See BOUNDARIES; CORPORATIONS, 7; ESTATES OF DECEASED PERSONS, 6; SALE, 5.

EVIDENCE.

1. OBJECTION TO ADMISSIBILITY — APPEAL. — An objection to the admissibility of evidence if not made on the trial, cannot be raised for the first time in the Supreme Court. — *Scott v. Sierra Lumber Co.*, 71.
2. KNOWLEDGE OF THE COURT — UNITED STATES SURVEY — AREA OF QUARTER SECTION. — The court will take judicial notice of the intended area of a quarter section under the system adopted by the United States for surveying and marking out its public lands; and whenever a claim is made that a quarter section contains a greater area, affirmative proof must be produced that the lines were so run upon the ground as to include such greater area. — *Quinn v. Windmiller*, 461.
3. CAPACITY TO CONTRACT — OPINION OF WITNESSES. — The issue presented to the jury for their determination was whether or not a deceased person had in his lifetime been in such a state of mind as to have been unduly influenced to make the contract in suit by the plaintiff, who claimed and was believed by the deceased to be a spiritual medium. *Held*, that the opinion of witnesses as to the capacity of the deceased to make contracts with those whom he believed to be mediums was inadmissible in evidence. — *Conner v. Stanley*, 315.
4. VALUE OF LAND — OPINION OF WITNESS. — A witness called upon to give an opinion as to the value of land must lay a proper foundation by showing that he possesses the means to form an intelligent opinion; but it is not essential that his knowledge should be derived from any peculiar skill in a particular pursuit or branch of business or department of science. — *Reed v. Drais*, 491.
5. OPINION OF JUDGE. — A paper which purports to be the opinion of the judge in a former action between the same parties, but is not signed by the judge or authenticated in any way, is not admissible in evidence in connection with the judgment roll in that action. — *Wixson v. Devine*, 341.
6. MEDICAL WORKS. — In an action to recover damages for personal injuries, a medical book, although proved to be of standard au-

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EVIDENCE (Continued).

thority, is not admissible in evidence to prove the nature and probable effect of the injuries. — *Gallagher v. Market Street Railway Company of San Francisco*, 13.

7. **ID.** — The books to which a medical expert refers cannot be resorted to in order to support his testimony, but they may be used to contradict or discredit him. — *Id.*
8. **STATEMENTS OF A DECEASED PERSON AGAINST HIS INTEREST.** — In an action to cancel a deed made by a son just before his death to his father, and to quiet the title of the son's estate to the lands purporting to be conveyed thereby, one of the issues was whether or not the son had acquired these lands by a previous conveyance from his father without consideration, and as trustee for the latter to reconvey them when requested so to do. In connection with this issue, it was shown by the plaintiff that a bill of sale of certain personal property was given by the father to the son at the time of the alleged conveyance from him to his son, and that a second bill of sale of the same property was given by the son to the father at the time of the deed of conveyance sought to be cancelled, and that these two bills of sale were so intimately connected with the conveyances as to form substantially parts of the same transaction. *Held*, that statements by the son at the time as to the consideration for the first bill of sale were admissible on behalf of the defendant. — *Harris v. Harris*, 455.
9. **DECLARATIONS OF AGENT.** — In an action for the specific performance of a parol agreement entered into by an agent on behalf of his principal, declarations by such agent a year or two after the consummation of the agreement with respect to the terms thereof are inadmissible against his principal. — *Clunie v. Sacramento Lumber Company*, 313.
10. **IMPEACHMENT OF WITNESS.** — Affidavits or letters of a witness which tend, although in a slight degree, to contradict his testimony, are admissible for that purpose. — *Empire G. M. Co. v. Bonanza G. M. Co.*, 406.
11. **IMPEACHMENT OF WITNESS — ATTEMPT AT BRIBERY.** — Where a witness has testified to matters material to the issues, the party against whom he has testified may on cross-examination show that the witness is hostile to or prejudiced against him, and to that end may lay the foundation for showing that the witness has attempted to buy or bribe other witnesses; but this can only be done when the witness has testified to material matters. — *Luhrs v. Kelly*, 289.
12. **DISBURSEMENT.** — In an action at law or in equity, if the plaintiff offers evidence tending to show that the defendant has received moneys growing out of their adventures, whether as joint owners or as copartners, the defendant will be entitled to show that such moneys have been disbursed in the due course of the business. — *Fisher v. Sweet*, 228.

See **APPEAL**, 10; **ATTACHMENT**, 2, 3; **ATTORNEYS AT LAW**, 2, 4, 5; **BONA FIDE PURCHASER**; **CANCELLATION**, 2; **CORPORATIONS**, 5, 6; **CRIMINAL LAW**, 4, 5, 9, 13, 14, 18, 24; **DEED**, 7, 10, 11; **DIVORCE**, 5; **EJECTMENT**, 1, 3, 5; **ELECTION**, 3-6; **ESTATES OF DECEASED PERSONS**, 2, 10; **FORCIBLE DETAINER**; **HOMESTEAD**, 4; **INSTRUCTIONS**, 4, 6; **JURY AND JURORS**, 2; **LIBEL**, 1; **MARRIED WOMEN**, 4-6; **MINES AND MINING**, 9; **MISTAKE**; **NEGLIGENCE**,

EVIDENCE (Continued).

3, 6-8; NEW TRIAL, 2, 3, 5-7, 13; SALE, 4; SLANDER; SWAMP AND OVERFLOWED LANDS, 4; TRUST, 5; VENDOR AND VENDEE, 1-3; VERDICT, 1; WATER AND WATER RIGHTS, 4, 5, 8; WILL, 4-6; WITNESS.

EXCEPTIONS. See BILL OF EXCEPTIONS.

EXECUTION.

1. EXEMPTION FROM A PERSONAL PRIVILEGE. — Exemption of property from execution is a personal privilege which may be claimed or waived at the option of the debtor. — *Keybers v. McComber*, 395.
2. ID. — HOW AND WHEN MUST BE CLAIMED. — Where a debtor has more property of a particular kind than is exempt from execution, and a writ is levied upon a portion thereof, leaving as much as the law exempts, and thereafter the debtor claims as exempt a portion of the property levied upon, the residue in the hands of the officer being insufficient to satisfy the writ, the debtor to make good his claim of exemption must offer to surrender to the officer the other property of the same general kind subject to execution, or so much as may be necessary to satisfy the writ, and failing to do so he is not entitled to recover against the officer for an unlawful seizure. — *Id.*
3. EXECUTION SALE — TITLE OF PURCHASER — RETURN OF SHERIFF — RELATION — PRIORITY. — On a sale of land under an execution, the title of the purchaser does not depend on the sheriff's return to the writ. The title relates back to and takes priority from the date of the judgment lien, and not from the date of any real or pretended statutory levy. — *Hibberd v. Smith*, 547.

See APPEAL, 5, 7; SURETYSHIP, 1, 2.

EXECUTORS AND ADMINISTRATORS. See ASSOCIATIONS; ESTATES OF DECEASED PERSONS.

EXEMPTION. See EXECUTION, 1, 2.

FALSE REPRESENTATIONS. See INSURANCE, 6, 7.

FAMILY ALLOWANCE. See ESTATES OF DECEASED PERSONS, 15, 16.

FENCES.

1. ACTS IN RELATION THERETO. — The Acts of April 27, 1855, and April 3, 1860, concerning lawful fences, are continued in force under section 19 of the Political Code, and consequently the counties to which they apply are not subject to the provisions of section 841 of the Civil Code. — *Meade v. Watson*, 591.
2. ID. — WHAT CONSTITUTES. — A fence which is good, strong, substantial, and built of stone, forming a perfect enclosure, and sufficient to turn stock, is a lawful fence within the meaning of the statute, although it is not specifically described therein. — *Id.*
3. ID. — DIVISION FENCE. — The line or division fences provided for by the statute of 1860 must be lawful fences. — *Id.*
4. ID. — In an action brought under the statute to recover one half the value of a partition fence, and to foreclose a lien therefor, it is

FENCES (Continued).

not necessary for the plaintiff to show that other fences which have been adopted by the defendant in completing his enclosure are lawful fences. — *Id.*

See BOUNDARIES; EJECTMENT, 1; EMINENT DOMAIN, 12.

FINDINGS.

1. SUFFICIENCY OF. — Findings of fact need not follow the language of the pleadings. If the truth or falsity of each material allegation not admitted can be deduced from the findings, the requirements of the Code are complied with. — *Clary v. Hazlitt*, 236.
2. ADMISSIONS IN PLEADING. — No findings are necessary as to facts admitted by the pleadings. — *Taylor v. Central Pacific Railroad Company*, 615.
3. FACTS IN ISSUE — ADMISSIONS. — Findings should be limited to the facts put in issue by the pleadings, and are not required as to admitted facts. If, however, findings are made upon the admitted facts, they must be in harmony with such facts. — *Walker v. Brem*, 599.
4. *Id.* — The findings reviewed, and held, to be in conflict with admissions in the answer. — *Id.*
5. JUDGMENT ENTERED WITHOUT. — In an action tried by the court without a jury, findings, unless waived, are necessary, and a judgment entered in the absence of findings will be set aside. — *Savings and Loan Society v. Thorne*, 53.
6. *Id.* — WAIVER — NOTICE OF NEW TRIAL. — Findings are not waived by giving a notice of motion for a new trial. — *Id.*
7. PRACTICE — CONCLUSION OF LAW. — A direction added by the court to its findings of fact, that judgment be entered in accordance with the findings in favor of the plaintiff for restitution of the premises, and for his costs and disbursements, states a conclusion of law. — *Murphy v. Snyder*, 451.

See BILL OF EXCEPTIONS, 1; EJECTMENT, 2; JUDGMENT, 9; MINES AND MINING, 9; NEW TRIAL, 13, 14; PLEADINGS, 3; STATUTE OF LIMITATIONS, 1; VENDOR AND VENDEE, 1; WATER AND WATER RIGHTS, 4, 8.

FIRE. See NEGLIGENCE, 3-8.

FIRE INSURANCE. See INSURANCE.

FISHING SCOW. See INSURANCE, 3.

FORCIBLE DETAINER.

POSSESSION — LEASE AS EVIDENCE. — In an action for a forcible detainer, a lease to the plaintiff under which he had formerly been in possession of the land in controversy, held, admissible in evidence for the purpose of showing the extent of such possession, and his right to possession at the time of the alleged forcible detainer. — *Murphy v. Snyder*, 451.

FORECLOSURE. See APPEAL, 5; MORTGAGE, 5-7, 9, 10, 12; STREET ASSESSMENT.

FORFEITURE. See INSURANCE, 8.

FRANCHISE. See WATER AND WATER RIGHTS, 1.

FRAUD.

1. TITLE OBTAINED BY — EQUITABLE RELIEF. — Certain transactions by which the title to real property had been acquired were set aside by the court below, and a reconveyance directed. On a review of the evidence, *held*, that the relief granted was proper. — *Raynor v. Mintzer*, 159.
2. ID. — PARTIES TO ACTION. — In such a case, the participants in the fraud, and all persons claiming an interest in the property through or by means of the transactions in question, may be joined as parties defendant. — *Id.*
3. ID. — PLEADING — DEMURRER FOR MISJOINDER OF CAUSES OF ACTION. — The complaint stated a variety of circumstances differing in their nature, but connected with and tending to establish the alleged fraud. *Held*, that the complaint was not demurrable for a misjoinder of causes of action. — *Id.*
4. JUDGMENT — WHEN SET ASIDE ON THE GROUND OF. — A judgment at law will be set aside on the ground of fraud only when the fraud was practiced in the act of obtaining the judgment, and the party against whom it was rendered and his counsel are free from negligence. — *Zellerbach v. Allenberg*, 296.

See CONVERSION; ESTATES OF DECEASED PERSONS, 20, 21; MORTGAGE, 3; TRUST, 3.

FRAUDULENT CONVEYANCE. See INSOLVENCY, 1.

GRANTOR AND GRANTEE. See DEED.

GROWING CROPS. See ATTACHMENT, 1.

GUARANTY. See PLEADINGS, 6; SALE, 3.

GUARDIAN AND WARD. See JURISDICTION.

HABEAS CORPUS. See WITNESS.

HEIRS. See QUIETING TITLE, 1.

HIGHWAY. See NAVIGABLE STREAM, 1.

HOMESTEAD.

1. MARRIED WOMAN — ACTION TO RECOVER POSSESSION — ADVERSE POSSESSION — STATUTE OF LIMITATIONS. — A married woman may maintain an action in her own name without joining her husband to recover possession of the homestead property; and as to such property, the Statute of Limitations will run against her in favor of an adverse possessor. — *Mauldin v. Cox*, 387.
2. ID. — CANNOT BE HELD ADVERSELY BY EITHER HUSBAND OR WIFE. — During coverture, and while the husband remains the head of family, neither party to the marital relation can hold the homestead adversely to the other. — *Id.*
3. ID. — LEASE OF BY HUSBAND — TENANT CANNOT HOLD ADVERSELY TO WIFE. — A tenant under a lease of the homestead executed by

HOMESTEAD (Continued).

the husband without the concurrence of the wife is estopped during the existence of the term from asserting an adverse possession against either the husband or the wife. — *Id.*

4. *Id.* — EVIDENCE — ENTRY UNDER LEASE. — On a review of the evidence, *held*, that the acts of the defendants, subsequent to their entry into the homestead under a lease from the husband, were not sufficient to indicate to the wife that their holding was adverse. — *Id.*

See MORTGAGE, 8.

HUSBAND AND WIFE. See DIVORCE; HOMESTEAD; MARRIED WOMEN.

IMPEACHMENT OF WITNESS. See EVIDENCE, 10, 11.

IMPROVEMENTS. See EMINENT DOMAIN, 6; TAXATION, 9.

INDEMNITY. See SURETYSHIP, 1, 2.

INFORMATION. See CRIMINAL LAW, 1-4, 6, 7, 23.

INHERITANCE. See ALIENS.

INJUNCTION.

1. DIVERSION OF WATER — DAMAGES — JOINDER OF CAUSES OF ACTION. — The plaintiffs were owners in severalty of certain distinct parcels of land, and the action was brought to restrain the defendant from depriving them of water carried by various ditches to their respective lands, and to recover damages sustained by reason of past diversions of the water. *Held*, that the cause of action of damages was several as to each of the plaintiffs, and that it could not be joined with the cause of action for an injunction, which was common to all of them. — *Barham v. Hostetter*, 272.
2. *Id.* — PLEADING — COMPLAINT. — The complaint examined, and *held* to be ambiguous, unintelligible, and uncertain. — *Id.*
See APPEAL, 2; CONTEMPT, 1; NAVIGABLE STREAM, 2; TAXATION, 4; WATER AND WATER RIGHTS, 7.

INSANITY. See WILL, 5.

INSOLVENCY.

1. TRANSFER OF PROPERTY TO CREDITOR — FRAUDULENT CONVEYANCE. — Neither part ii., title iii., of the Civil Code, nor the Statute of Frauds, prevent a debtor, admittedly insolvent, from transferring his property directly to his creditor, either absolutely in payment of his debt, or as security by way of mortgage. — *Wood v. Franks*, 32.
2. INVOLUNTARY — JURISDICTION OVER PROCEEDING, HOW ACQUIRED — COLLATERAL ATTACK. — The court obtains jurisdiction over a proceeding in involuntary insolvency, upon the filing of the petition properly signed and verified, and the service of a copy thereof, together with a copy of the order to show cause, on the debtor. For errors afterwards committed, its proceedings cannot be collaterally assailed. — *Luhrs v. Kelly*, 289.

INSOLVENCY (Continued).

3. **ID. — BOND OF ASSIGNEE — INSUFFICIENCY IN AMOUNT OF.** — The assignment in such a proceeding is not collaterally assailable by reason of the fact that the bond filed by the assignee and approved by the court was for a less amount than that required by the order appointing the assignee. — *Id.*
4. **INVOLUNTARY — EFFECT OF ADJUDICATION.** — An adjudication of a debtor to be an involuntary insolvent is a decree *in rem* as regards the status of the debtor. — *Arnold v. Kahn*, 472.
5. **ID. — ORDER TO SHOW CAUSE — SERVICE BY PUBLICATION — RIGHTS OF ASSIGNEE.** — The notice to the debtor required by section 10 of the Act of 1880, to show cause why he should not be adjudged an involuntary insolvent, may be served on him by publication with the same effect, so far as the rights of the assignee are concerned, as if a personal service had been made. — *Id.*
6. **DISCHARGE — CITIZEN OF ANOTHER STATE.** — An action on a promissory note which does not specify a place of payment, and which was executed in this State subsequently to the enactment of the insolvent law, in favor of one who was and continued to be a resident and citizen of another State, is not barred by the discharge of the maker from his debts under that law. — *Rhodes v. Borden*, 7.

See CRIMINAL LAW, 22, 23.

INSTRUCTIONS.

1. **CRIMINAL LAW — FAILURE OF JURY TO HEAR.** — The failure of the jury to hear instructions given them by the court is to be remedied by requesting the court to repeat the instructions at such a time and under such circumstances that they can be heard. It is not a ground for reversal of the judgment entered on the verdict. — *People v. Price*, 350.
2. **NEED NOT BE REPEATED.** — The refusal to give an instruction which has already been given in substance is not error. — *Bullard v. Stone*, 477.
3. **ID. — A refusal to give instructions which have already been given in substance is not error.** — *Dufour v. C. P. R. R. Co.*, 319.
4. **ID. — SURROUNDING CIRCUMSTANCES.** — An instruction that the jury, in case they find for the plaintiff, "must take into consideration all the circumstances surrounding the case," cannot be construed as authorizing them to consider facts not embraced in the pleadings or evidence. — *Id.*
5. **CRIMINAL LAW — IMMATERIAL ERROR.** — In a trial for murder, an erroneous instruction to the effect that a certain act would constitute murder in the second degree, whereas it might amount to manslaughter only, is immaterial if the defendant is convicted of murder in the first degree. — *People v. O'Neal*, 378.
6. **ID. — DEFENDANT AS A WITNESS ON HIS OWN BEHALF.** — The defendant having testified as a witness on his own behalf, the court instructed the jury in effect that in determining the weight to be given to his testimony, they must consider the circumstances under which he testified, the consequences to him from the result of the trial, and all the inducements and temptations which would ordinarily influence a person in his situation. *Held*, that the instruction was proper. — *Id.*

See CRIMINAL LAW, 16, 20; WATER AND WATER RIGHTS, 6; WITNESS, 2.

INSURANCE.

1. **FIRE INSURANCE — POLICY — APPLICATION — NOTICE TO AGENT — INSURER WHEN NOT BOUND BY.** — A policy of fire insurance expressly exempted the insurer from being bound by any act or statement not contained in the application for or indorsed on the policy. *Held*, that notice to its agent as to a matter different from that contained in the policy and application did not bind the insurer. — *Enos v. Sun Insurance Company*, 621.
2. **ID. — CONDITIONS OF POLICY — HOW WAIVED.** — The policy further provided that nothing less than a distinct, specific agreement, indorsed on or attached to the policy, should be construed as a waiver of any printed or written conditions or restrictions therein. *Held*, that a local agent of the insurer could not waive any of the provisions of the policy, except in the mode thus provided for. — *Id.*
3. **ID. — FISHING SCOW — BUILDING — QUESTION FOR JURY.** — A question involved in the action was whether or not the property insured, a fishing scow, was a building within the meaning of that word as used in the policy. *Held*, that the question was one of fact to be determined by the jury from all the surrounding circumstances. — *Id.*
4. **FIRE INSURANCE — POLICY — CONDITION AS TO WATCHMAN.** — The property insured was a quartz mill. At the time of the issuing of the policy the mill was in operation, but afterwards became idle, and so continued until destroyed by fire. One of the conditions of the policy was that the insured should employ a watchman to guard the premises when idle. The only watchman employed was a person who worked during the day and slept at night too far from the mill to guard it against fire. The mill could not be seen from the place where he slept, nor did he know of the fire until after it occurred, and the mill was destroyed. *Held*, that the condition had not been complied with. — *Wenzel v. Commercial Insurance Company of California*, 438.
5. **ID. — CHANGE OF POSSESSION.** — A further condition of the policy was that if any change should take place in the possession of the property without the written consent of the insurer, the policy should be void. *Held*, that the condition was violated by leasing the property and surrendering possession to the lessee without such consent. — *Id.*
6. **FIRE INSURANCE — STATEMENT IN PROOFS OF LOSS — FALSE REPRESENTATIONS BY INSURER.** — In an action on a fire insurance policy, the assured is not bound by a statement made by him in his proofs of loss, if he was induced to make such statement by the false representations of an agent of the insurer. — *Cook v. Lion Fire Insurance Company*, 368.
7. **INSURANCE POLICY — CONSTRUCTION — FALSE DESCRIPTION.** — In a policy of fire insurance, a portion of the description which is false will be disregarded, where enough remains to identify the property. — *Hatch v. New Zealand Insurance Company*, 122.
8. **FIRE INSURANCE — WAIVER OF FORFEITURE.** — In an action upon a policy of fire insurance, it appeared that soon after the occurrence of the fire defendant being notified of the fact, directed the proofs to be made out, which was done, and subsequently required the plaintiff to present witnesses and vouchers. After these witnesses and vouchers had been examined at length, the defendant said the proofs were satisfactory, instructed the plaintiff to make out formal proofs of loss, and said that the money would be paid at the expiration of the sixty days allowed by the policy for the payment of

INSURANCE (Continued).

the loss. Nothing more was said by defendant until the expiration of that period, when, in response to a demand by the plaintiff for the money, defendant said the policy had been avoided by a breach of its conditions, and refused to pay. The defendant had full knowledge of all the facts when, after the examination of the witnesses and vouchers it expressed its satisfaction with the proofs and promised to pay the money. *Held*, that these acts on the part of the defendant constituted a waiver of any forfeiture by the plaintiff resulting from a breach of the conditions of the policy. — *Silverberg v. Phenix Insurance Company*, 36.

9. **ID. — AUTHORITY OF AGENT.** — The agents of the defendant were authorized, there being no provision in the policy to the contrary, to modify or altogether waive a condition of the policy. — *Id.*
10. **FIRE INSURANCE — PLEADING.** — The complaint in an action on a fire insurance policy alleged that a watchman was employed by plaintiff *in and upon* the premises day and night, and *was upon* the premises at the time of the fire. The answer denied that a watchman was in and upon the premises day and night, and averred that at the time of the fire no watchman was in and upon the premises. *Held*, that the denial is sufficient, and presents an issue as to whether or not the watchman was there. — *Trojan Mining Company v. The Fireman's Insurance Company*, 27.

See MORTGAGE, 12.

INTENTION. See CRIMINAL LAW, 16; DEED, 1, 2, 6; MORTGAGE, 1.

INTEREST.

PROMISSORY NOTE — INTEREST UPON DEFAULT — HOW COMPUTED. —

Where a promissory note provides that in case of non-payment at maturity it shall bear interest at a certain rate until paid, interest should be computed upon it from its date and not from the time of default. — *Main v. Casserly*, 127.

See ESTATES OF DECEASED PERSONS, 19; PAWNBROKERS; PLEADINGS, 1.

JEOPARDY. See ONCE IN JEOPARDY.

JOINT DEBTORS.

PROCEEDINGS AGAINST — AMENDMENT OF ORIGINAL PLEADINGS. — Proceedings under sections 989 to 994 of the Code of Civil Procedure, for the purpose of binding a partner by a judgment recovered against his copartner, are in the nature of an action upon a judgment; neither the pleadings nor the judgment in the original action can be amended. — *Waterman v. Lipman*, 26.

JUDGE. See NEW TRIAL, 16.

JUDGMENT.

1. **ON PLEADINGS — INCONSISTENT DEFENSES — DENIALS AND ADMISSIONS.** — A judgment on the pleadings is not authorized if the answer deny the material allegations of the complaint, although in a special defense separately stated the allegations formerly denied are admitted. — *Botto v. Vandament*, 332.

JUDGMENT (Continued).

2. **DISMISSAL OF ACTION — DEATH OF PLAINTIFF — SUBSTITUTION OF PERSONAL REPRESENTATIVE.** — A judgment dismissing an action for want of prosecution is not void, although made after the death of the plaintiff, and without the substitution of his personal representative. — *Wallace v. Center*, 133.
3. **SETTING ASIDE — ABSENCE OF ATTORNEY — DISCRETION.** — It is not an abuse of discretion for a trial court to set aside a judgment by default rendered in the absence of the plaintiff and his attorney, when the latter resided at a considerable distance from the place of trial, and had reason to believe that the case would not be tried at the time it was taken up. — *Cameron v. Carroll*, 500.
4. **AGAINST DEFENDANT VOLUNTARILY APPEARING.** — A judgment in an action of ejectment rendered against a person who voluntarily appeared therein as a defendant, is not void so as to be collaterally assailable, although his name was not inserted in the complaint either originally or by amendment, and no order of the court granting him leave to appear in or defend the action, or to file an answer, is contained in the record. — *Tyrrell v. Baldwin*, 1.
5. **DEATH OF DEFENDANT — PURCHASER PENDENTE LITE — EJECTMENT.** — The death of a defendant in an action of ejectment after his answer was filed and before the trial does not render a judgment against him void as to those who purchased *pendente lite* his interest in the demanded premises. — *Id.*
6. **ID. — CONCLUSIVENESS OF.** — Where several judgments have been rendered in actions between the same parties in respect to the same subject-matter, the judgment last in point of time is conclusive. — *Id.*
7. **FORMER ADJUDICATION — JUDGMENT RECORD.** — A judicial record is not conclusive as to the truth of any allegations which were not material and traversable; but as to all those which were material and traversable, the judgment is conclusive between the same parties upon the same matter. — *Watson v. Devine*, 341.
8. **ID.** — Upon comparison of the judgment roll in the former action with the pleadings in this, *held*, that the same identical question was involved and was finally determined in the former action, and should not again be litigated between the same parties. — *Id.*
9. **EQUITY — GENERAL VERDICT — FINDINGS.** — No judgment can be entered on a general verdict rendered by a jury in an equity case, and a judgment thus entered will be reversed for a failure of the court to find upon the issues. — *Learned v. Castle*, 14.

See AMENDMENT, 2; APPEAL, 3-5, 7, 8; CLAIM AND DELIVERY; CONTEMPT, 2; DEED, 5; DIVORCE, 2, 3; EMINENT DOMAIN, 9, 10; EXECUTION, 3; FINDINGS, 5, 7; FRAUD, 4; INSOLVENCY, 4; INSTRUCTIONS, 1; JOINT DEBTORS; JUSTICES' COURTS, 2-4; MINES AND MINING, 9; MORTGAGE, 10, 12; NEW TRIAL, 13; PARTNERSHIP, 3; PLEADINGS, 2; PRACTICE; STREET ASSESSMENT, 1; SURETYSHIP, 1, 2, 4, 5; TAXATION, 5; VENDOR AND VENDEE, 4; VERDICT, 2.

JUDICIAL NOTICE. See EVIDENCE, 2.

JURISDICTION.

GUARDIANSHIP — CONFLICT. — A petition for letters of guardianship of a minor was filed in the Superior Court of the city and county of San Francisco, stating that the minor was a resident of such city

JURISDICTION (Continued).

and county, but was temporarily at school in Alameda County. A citation was issued and served upon all the parties interested requiring them to appear and show cause why the petition should not be granted. Before the day fixed for the return of the citation, one of the parties on whom it had been served applied to the Superior Court of Alameda County for letters of guardianship of the minor, which were issued to him, the fact of the previous application not being brought to the knowledge of the court. *Held*, that as the Superior Court of the city and county of San Francisco had jurisdiction to hear and determine the question of the residence of the minor, the need of a guardian, and the propriety of appointing the petitioner, it could not be deprived of this jurisdiction by the subsequent proceedings in the Superior Court of Alameda County. — *Guardianship of Danneker*, 643.

See ATTACHMENT, 2; CORPORATIONS, 2; DIVORCE, 1; INSOLVENCY, 2; JUSTICES' COURTS, 2, 3, 9; PLEADINGS, 2; TAXATION, 1.

JURY AND JURORS.

1. JURY TRIAL—WHEN WAIVED.—In an action at law, a jury is waived, if on the day set for the trial the parties appear, and a trial is had before the court without objection. — *Boston Tunnel Co. v. McKenzie*, 485.
2. RECEIVING EVIDENCE OUT OF COURT.—A jury is guilty of improper conduct in receiving evidence out of court. — *Rodgers v. C. P. R. R. Co.*, 607.

See CRIMINAL LAW, 12; EJECTMENT, 3; EMINENT DOMAIN, 7, 8; INSTRUCTIONS, 1, 4, 6; INSURANCE, 3; MINES AND MINING, 5, 6; MORTGAGE, 3; WILL, 3; WITNESS, 2, 3.

JUSTICES' COURTS.

1. JUSTICES OF THE PEACE—SECTION 103 OF THE ACT OF APRIL 1, 1880, CONSTRUED.—Section 103 of the Act of April 1, 1880, amending the Code of Civil Procedure, applies to justices of the peace elected at the general State election of 1879, as well as to those subsequently elected. — *Shearer v. City of Oakland*, 633.
2. JUDGMENT—JURISDICTION MUST AFFIRMATIVELY APPEAR.—A Justice's Court is an inferior court, and a party relying upon or claiming any right under its judgments must affirmatively show its jurisdiction. — *Keybers v. McComber*, 395.
3. ID.—SUMMONS—DEFECTIVE STATEMENT IN—VOIDABLE JUDGMENT—DEFAULT.—The summons in an action in a Justice's Court for a trespass on land contained a statement that in case of the defendant's failure to answer, "the plaintiff would take judgment for the amount claimed in the complaint." *Held*, that a judgment by default rendered after a personal service on the defendant was voidable only and could not be collaterally attacked. — *Id.*
4. APPEAL—UNDEERTAKING—DEPOSIT.—Section 978 of the Code of Civil Procedure authorizes an appellant from a judgment of a Justice's Court to make a deposit of money in lieu of an undertaking on appeal. Such a deposit should be transmitted to the clerk of the Superior Court as security on the appeal. — *Mullen v. Hunt*, 69.
5. ID.—WITHDRAWAL OF DEPOSIT—ABANDONMENT OF APPEAL.—After the statutory time for filing an undertaking has expired, the appellant cannot withdraw the deposit previously made by him,

JUSTICES' COURTS (Continued).

- and in lieu thereof file an undertaking. If he does so, it will be considered an abandonment of the appeal. — *Id.*
6. APPEAL FROM — UNDERTAKING — JUSTIFICATION OF SURETIES. — Where the sufficiency of the sureties upon an undertaking on appeal from a Justice's Court is excepted to, the appeal cannot be perfected by filing a new undertaking without notice to the adverse party. — *Wood v. Superior Court*, 115.
 7. PRACTICE — APPEAL FROM — NOTICE — PROOF OF SERVICE. — Where the record of a case on appeal from a Justice's Court is silent as to service of the notice of appeal, the fact of service may be proved by an affidavit filed pending a motion to dismiss the appeal on that ground. — *Dalzell v. Superior Court*, 453.
 8. *Id.* — ATTORNEY ABSENT FROM HIS OFFICE. — An affidavit of service which states that a notice was served on the attorney for the respondent by leaving it on the desk of the attorney in the front room of his law office between the hours of 8 in the morning and 6 in the afternoon, and that there was no person in *said front room* at the time, is sufficient to show constructive service of the notice upon the attorney during his absence from his office. — *Id.*
 9. *Id.* — JURISDICTION. — Service of notice of an appeal is a jurisdictional fact, and if such service has not been made within the statutory time and according to the requirements of the statute, the appellate court derives no jurisdiction of the case. — *Id.*

See APPEAL, 4; ARREST.

JUSTIFICATION. See ATTACHMENT, 2.

LAND. See CORPORATIONS, 12; POSSESSION; PUBLIC LANDS; STATUTE OF FRAUDS, 2-4; SWAMP AND OVERFLOWED LANDS.

LANDLORD AND TENANT. See EJECTMENT, 4; HOMESTEAD, 3, 4; LEASE; TAXATION, 9.

LARCENY. See CRIMINAL LAW, 9, 10.

LAUNDRIES. See CONSTITUTIONAL LAW, 1.

LEASE.

CONTRACT FOR — PAYMENT OF RENT — CANCELLATION. — An entry under a written contract for a lease for a stated term, and at a specified rent, and the payment and receipt of the rent, constitute a valid lease between the parties for the term and at the rental specified. Neither party can subsequently cancel the contract without the consent of the other. — *Cheney v. Neuberry & Co.*, 125.

See EJECTMENT, 2; FORCIBLE DETAINER; HOMESTEAD, 3, 4.

LEVY. See ATTACHMENT, 2.

LIBEL.

1. EVIDENCE — DAMAGE. — In an action for libel, where the complaint contains no averment of special damage, it is error to permit a witness to state his opinion as to the amount of damage the plaintiff has sustained. — *Fleming v. Albeck*, 226.

LIBEL (Continued).

2. **ID. — PART OF PUBLICATION NOT LIBELOUS PER SE.** — Where the alleged libel consists of two distinct parts, one of which is not libelous *per se*, this part should be distinguished from that which is libelous. — *Id.*

LICENSE. See **TAXATION**, 6, 8.

LIEN. See **LOGGER'S LIEN**; **MORTGAGE**.

LIMITATIONS OF ACTIONS. See **STATUTE OF LIMITATIONS**.

LOCATION. See **MINES AND MINING**, 3, 5-9.

LOGGER'S LIEN.

ACTION TO ENFORCE—COMPLAINT.—In an action to enforce a logger's lien, under the Act of March 30, 1878, as amended by the Act of April 12, 1880, the complaint must allege that something was due from the defendants to the original contractor when the lien of the plaintiff was filed, or that the defendant was notified or had knowledge of the claim of the plaintiff prior to the payment in full of the amount due to the original contractor under the contract. — *Wilson v. Barnard*, 422.

MANDAMUS.

1. **PLEADING — CLAIM AGAINST A COUNTY.** — In an application for a writ of mandamus to compel a county treasurer to pay a warrant previously issued by the county auditor, a petition which alleges that the board of supervisors of the county audited and allowed the claim, and ordered the auditor to draw a warrant for its amount; and that the auditor in pursuance of this order issued, drew, and delivered to the claimant such warrant, is sufficient, although it does not follow the exact words of the statute. — *Jones v. Morgan*, 308.
2. **AFFADAVIT — DEMURRER.** — The affidavit upon which a writ of mandate is issued may be treated as a complaint, and demurred to accordingly, but it is not necessary that the affidavit should contain the title of the action or proceeding in which it is made. — *McCrory v. Beaudry*, 120.
3. **ID.** — The affidavit in this case examined, and held to be sufficient. — *Id.*

See **APPEAL**, 6; **PUBLIC OFFICERS**, 3.

MANSLAUGHTER. See **MURDER AND MANSLAUGHTER**.

MARRIAGE. See **DIVORCE**, 2.

MARRIED WOMEN.

1. **CONTRACT TO ASSUME INDEBTEDNESS — ORIGINAL OBLIGATION — STATUTE OF FRAUDS.** — A married woman may enter into a contract to assume the payment of an indebtedness of a third person in consideration of the conveyance to her of a tract of land. The promise to answer for such indebtedness is an original ob-

MARRIED WOMEN (Continued).

- ligation and need not be in writing. — *Sacramento Lumber Company v. Wagner*, 293.
2. **CAPACITY TO CONTRACT — PROMISSORY NOTE — HOLDER FOR VALUE.** — In this State a married woman may enter into any engagement or transaction respecting property, which it would be competent for an unmarried woman to enter into, and her capacity in this respect extends to the making of a promissory note for a consideration or the accommodation of another person; and such a note may be enforced by a holder for value against her separate estate, though taken by him with notice of the circumstances under which it was given. — *Goad v. Moulton*, 536.
 3. **SEPARATE PROPERTY — REPLEVIN — PLEADING.** — In an action by a married woman to recover personal property, she need not in her complaint allege the coverture, but when that fact appears on the trial, may show that the property demanded is her separate property. — *Shumway v. Leakey*, 458.
 4. **Id. — EVIDENCE — SCHEDULE.** — In such an action, a schedule of the wife's separate property filed and recorded under sections 165 and 166 of the Civil Code is admissible in evidence to prove her title. — *Id.*
 5. **Id. — ASSESSMENT ROLL.** — The assessment roll of the county showing that no separate property has been assessed to the wife, and that part of the property described in the complaint was assessed to the husband as his own, is inadmissible to prove property out of the wife and in her husband, unless it is shown that she gave in the property as that of her husband or had some knowledge that it was so assessed. — *Id.*
 6. **Id. — LAWS OF ANOTHER STATE.** — The tenure by which personal property acquired in another State and brought into this is held, as between husband and wife, will depend upon the laws of the State where it was acquired; but these laws are to be proved like any other fact, and in the absence of all evidence will be presumed to be the same as the laws of this State. — *Id.*

See HOMESTEAD.

MEASURE OF DAMAGES.

1. **CONTRACT FOR THE SALE OF PERSONAL PROPERTY — BREACH OF BY SELLER.** — The measure of damages in an action by the buyer against the seller to recover for the breach of a contract for the sale and delivery of personal property is prescribed by sections 3308 and 3354 of the Civil Code. — *Bullard v. Stone*, 477.
2. **Id. — MONEY PAID TO THIRD PERSON.** — In such an action, money paid by the plaintiff to a third person, in pursuance of the contract, may be recovered from the defendant. — *Id.*
3. **SALE — FAILURE TO DELIVER.** — A loss resulting to the vendee in a contract of sale from a failure to realize upon a contract with a third person, which was known to the vendor at the time of the sale, *held*, too remote to be recovered as damages from the vendor for a delay in delivering the goods, although the delay was the cause of the vendee's failure to realize upon his contract. — *Friend and Terry Lumber Company v. Miller*, 464.

See EMINENT DOMAIN, 12; TRESPASS.

MEMBER OF CONGRESS. See ELECTION, 7.

MINES AND MINING.

1. UNITED STATES PATENT — UNAUTHORIZED RESERVATION IS VOID. — An unauthorized reservation or condition in a United States patent to land is void. — *Clary v. Hazlett*, 280.
2. ID. — PATENT TO PLACER CLAIM — RESERVATION OF QUARTZ LODE. — Section 2333 of the United States Revised Statutes authorizes the reservation in a patent to a placer mining claim, of any vein or lode of quartz, or other rock in place bearing gold, silver, lead, tin, copper, or other valuable deposits, claimed or known to exist within the boundaries of the placer claim at the date of the patent; and the patentee acquires no title or right of possession to such vein. — *Id.*
3. MINING CLAIM — OCCUPATION — SUBSEQUENT POSSESSION — RIGHT OF POSSESSION. — Prior occupation and working of the mineral lands of the United States, without complying with the requirements of any law, either federal, district, or local custom, does not give a right of possession as against one who afterwards peaceably locates a mining claim covering the same ground, and in all respect complies with the federal and district mining laws and regulations. From the time the second person has perfected his location, the prior occupant is a trespasser. — *Horswell v. Ruiz*, 111.
4. ID. — BOUNDARY LINES NEED NOT BE PARALLEL. — The provision of the statute of 1872, requiring the end lines of each mining claim to be parallel to each other, is merely directory, and no consequence is attached to a deviation from its direction. — *Id.*
5. MINING CLAIM — ABANDONMENT — QUESTION FOR JURY. — In an action of ejectment to recover a mining claim, it is for the jury to determine whether a location which the evidence tends to show was made prior to that attempted by the plaintiff has been forfeited or abandoned. — *Taylor v. Middleton*, 650.
6. ID. — LOCATION. — The marking of a mining location must be such that the boundaries of the claim can be readily traced, and whether or not the marking conforms to this requirement is a question for the jury. — *Id.*
7. MINING CLAIM — NOTICE OF LOCATION — ERRONEOUS DESCRIPTION. — An erroneous statement in a notice of location of a mining claim as to the quarter section in which the claim is situated, will not invalidate the notice, if the remaining portions of the description sufficiently identify the land. — *Duryea v. Boucher*, 141.
8. ID. — DESCRIPTION, WHEN SUFFICIENT. — The description in a notice of location of a mining claim is sufficient, if it designate the number of acres claimed, and define its boundaries on three sides. — *Id.*
9. ID. — ACTION TO DETERMINE RIGHT OF POSSESSION — JUDGMENT — FINDINGS — EVIDENCE. — In an action to determine the right of possession to a mining claim, an erroneous finding as to the location of the premises in controversy will not warrant a reversal, if the judgment be conclusively supported by the evidence and the other findings. — *Id.*

See TRESPASS.

MINORS. See ESTATES OF DECEASED PERSONS, 6.

MISTAKE.

EQUITY — REFORMATION OF WRITTEN INSTRUMENT — EVIDENCE. — A written instrument will not be reformed by a court of equity on

MISTAKE (Continued).

the ground that there was a mistake in drafting it, unless the evidence of such mistake is clear, satisfactory, and free from reasonable doubt. — *Cox v. Woods*, 317.

See BOUNDARIES; CANCELLATION, 1, 2; ELECTION, 1.

MORTGAGE.

1. **BILL OF SALE — WHEN A MORTGAGE — PRE-EXISTING DEBT — CONSIDERATION — INTENTION.** — In determining whether or not a bill of sale, given in consideration of a pre-existing debt, is a mortgage, the question to be settled is whether the intention of the parties was to cancel the debt or to secure its payment; and this is a question of fact, the determination of which depends upon the negotiations had at the time, and the subsequent acts of the parties. — *Cook v. Lion F. Ins. Co.*, 369.
2. **ID. — EVIDENCE.** — On a review of the evidence, held, that the bill of sale in question was not intended as a mortgage or pledge. — *Id.*
3. **CHATTEL MORTGAGE — FUTURE ADVANCES — QUESTION OF FRAUD FOR JURY.** — A chattel mortgage given for a greater sum than is due by the mortgagor to the mortgagee, to secure both a present indebtedness and future advances, is not fraudulent in law as to creditors of the mortgagor, because given for a greater sum than is due, even though the mortgage does not express upon its face that the excess is for future advances. Whether such mortgage was given in good faith is a question for the jury. — *Wood v. Franks*, 32.
4. **CHATTEL MORTGAGE — RECORDING.** — A chattel mortgage, accompanied by the affidavit of all the parties thereto, as required by section 2957 of the Civil Code, is deemed to be recorded within the meaning of that section, when being duly acknowledged or proved, and certified, it is deposited in the recorder's office with the proper officer for record. — *Meherin v. Oaks*, 57.
5. **PRACTICE — ENFORCEMENT OF DEBT.** — Under section 726 of the Code of Civil Procedure, a mortgagor cannot be compelled to pay any part of the mortgage debt until a decree is entered for a sale of the premises mortgaged; and he then becomes liable only for such deficiency as shall appear on the sheriff's return. — *Brown v. Willis*, 235.
6. **ID. — SUBSEQUENT MORTGAGEE — ACTION BY AFTER FORECLOSURE OF PRIOR MORTGAGE.** — The holder of a note secured by a second mortgage cannot, after foreclosure of the prior mortgage by a suit to which he was made a party defendant, and in which all his rights might have been settled, maintain an action on the note against the maker. — *Id.*
7. **MORTGAGE IN FEE — AFTER-ACQUIRED TITLE — FORECLOSURE.** — Where a mortgage of land purports to convey the fee, any title afterwards acquired by the mortgagor will feed the mortgage and inure to the benefit of the mortgagee; and this is so although the title when the mortgage was made was in the government of the United States, and was acquired by the mortgagor after a foreclosure of the mortgage. — *Orr v. Stewart*, 275.
8. **ID. — MORTGAGE OF HOMESTEAD.** — Section 2296 of the United States Revised Statutes does not prohibit the voluntary mortgaging of land entered as a homestead. — *Id.*
9. **PURCHASER AT FORECLOSURE SALE — RENTS AND PROFITS.** — A mortgagee who has purchased the mortgaged property at a foreclosure sale is not entitled to any of the rents and profits which accrued

MORTGAGE (Continued).

- prior to the time of his purchase; and where the property is in the hands of a receiver, the mortgagee cannot sue the latter for the rents and profits until they have been collected and received. — *Pendola v. Alexanderson*, 337.
10. FORECLOSURE — PERSONAL JUDGMENT. — In an action to foreclose a mortgage, an allegation in the complaint that the grantee of the mortgaged premises at the time of his purchase covenanted and agreed to pay the mortgage debt, and discharge the mortgage lien, is sufficient to sustain a personal judgment against such grantee for the deficiency. — *Pellier v. Gillespie*, 582.
 11. ID. — DESCRIPTION OF PROPERTY. — The description of the property in the mortgage and decree examined, and held sufficient. — *Id.*
 12. JUDGMENT FOR TAXES AND INSURANCE — PLEADING. — In an action to foreclose a mortgage, the judgment should not include the amount of taxes and insurance paid by the mortgagee on the mortgaged property, unless the complaint alleges their payment. — *Hibernia Savings and Loan Society v. Conlin*, 178.
- See APPEAL, 5; CORPORATIONS, 7; DEED, 12; ESTATES OF DECEASED PERSONS, 12, 13; INSOLVENCY, 1.

MUNICIPAL CORPORATIONS.

1. GRADING STREET — TRESPASS — OBSTRUCTING WATER-COURSE — MONTGOMERY AVENUE IMPROVEMENT. — In grading Montgomery Avenue under the Act of April 3, 1876, the city and county of San Francisco had no authority to erect an embankment across a natural water-course in such a manner as to obstruct the natural flow of the waters therein, and cause them to run over and permanently remain on the land of an adjoining proprietor. Such conduct is a trespass amounting to the taking of the property of another. The former Constitution of California under which the work was done renders void all legislation purporting to authorize such a proceeding. — *Conniff v. City and County of San Francisco*, 45.
2. ID. — ACTION FOR INJURIES — STATUTE OF LIMITATIONS. — The Act of April 3, 1876, does not provide a mode of compensation for such damages, and consequently the party injured may maintain an ordinary action therefor against the municipality. Such action is not barred until the expiration of three years from the time the cause of action accrued. — *Id.*

See CORPORATIONS, 9; COUNTIES; TAXATION, 8, 9.

MURDER AND MANSLAUGHTER. See CRIMINAL LAW, 11, 13, 16-21; INSTRUCTIONS, 5, 6.

MUTUAL ACCOUNT. See STATUTE OF LIMITATIONS, 2.

NAVIGABLE STREAM.

1. PUBLIC HIGHWAY — WATER FRONT OF BENICIA — RIGHT OF OWNER TO FREE ACCESS. — The navigable waters of the Straits of Carquinez, adjoining the permanent water front of the city of Benicia, as established by the Act of March 21, 1868, are a public highway; and an owner of land, the boundary of which forms a part of the water front, has a vested right of free access to such highway, of which he cannot be deprived without compensation. — *Shirley v. Bishop*, 543.

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NAVIGABLE STREAM (Continued).

2. **ID. — WHARF — NUISANCE — INJUNCTION.** — The erection of a wharf materially obstructing such access will be enjoined as a nuisance. — *Id.*
3. **STREET RAILROAD — IMPLIED GRANT OF RIGHT TO BUILD BRIDGE.** — A grant by the legislature of the right to build a street railroad over a designated route which crosses a navigable stream, includes the right to build a bridge over the stream. — *People ex rel. Board of State Harbor Commissioners v. Potrero and Bay View Railroad Company*, 166.
4. **ID. — ACT ADMITTING CALIFORNIA INTO UNION — POWER OF STATE OVER NAVIGABLE STREAMS.** — The provision of the act of Congress admitting California into the Union, which declares "that all navigable waters within the State shall be common highways and forever free," etc., does not impair the power of the State to authorize the construction of bridges over navigable streams. — *Id.*
5. **ID. — POWER TO CONSTRUCT BRIDGE.** — While the power of the State with respect to the construction, regulation, and control of bridges over navigable streams is subordinate to that of Congress, still until Congress acts on the subject the power of the State is plenary. — *Id.*
6. **ID. — AUTHORIZED BRIDGE NOT A NUISANCE.** — A bridge over a navigable stream, built in pursuance of a valid authorization from the State, cannot be adjudged a nuisance. — *Id.*

NEGLIGENCE.

1. **CONTRIBUTORY.** — To authorize a recovery for an injury occasioned by the negligence of another, the party injured must have exercised such reasonable care to avoid the injury as a prudent person would have exercised under like circumstances. — *Dufour v. Central Pacific Railroad Company*, 319.
2. **ID. —** On a review of the evidence, *held*, that the court could not say as a matter of law that there was any contributory negligence in this case. — *Id.*
3. **RAILROAD — DAMAGE CAUSED BY SPREADING FIRE — PLEADING — EVIDENCE — VARIANCE.** — The action was against a railroad company to recover damages for injuries caused by fire. The complaint alleged that through the negligence of the defendant fire from its locomotive was suffered to escape and did escape, and by reason thereof came upon the land of the plaintiff, causing the injury complained of. The evidence was that the fire commenced on the land of another, from which it spread to the land of the plaintiff. *Held*, that there was no variance. — *Butcher v. Vaca Valley and Clear Lake Railroad Company*, 518.
4. **ID. — ORDINARY RESULT OF NEGLIGENCE — QUESTION FOR JURY.** — In such a case, the question whether the damage done to the plaintiff was an ordinary and natural result of the negligence must be determined by the jury from all the circumstances proved. — *Id.*
5. **ID. — RIGHT TO USE FIRE — UNAVOIDABLE INJURY.** — A railroad company authorized by its charter to use steam power necessarily has the right to use fire as a means of generating steam, and is not liable for injuries unavoidably produced by the fire kept for such purposes. — *Id.*
6. **ID. — EVIDENCE OF SIMILAR FIRE.** — On the trial, a witness testified that about two weeks after the fire complained of, at a place from a quarter to half a mile distant from the spot where it was

NEGLIGENCE (Continued).

- kindled, he saw fire in a field near the defendant's road, just after a train had passed, drawn by the same engine from which it was claimed the sparks escaped causing the damage to the plaintiff. *Held*, that the evidence was admissible. — *Id.*
7. *Id.* — SUBSEQUENT REPAIRS TO ENGINE. — Evidence is also admissible that soon after the fire the engine was repaired so as more effectively to retain the sparks. — *Id.*
 8. *Id.* — REVIEW OF THE EVIDENCE — CONCLUSION. — On a review of the evidence, *held*, that the negligence of the defendant was *prima facie* established. — *Id.*
 9. RAILROAD — DEATH OF EMPLOYEE — LIABILITY FOR. — A railroad company is liable for the death of an employee caused by the falling of a bridge negligently constructed and maintained by the company as a part of its road. — *Rodgers v. Central Pacific Railroad Company*, 806.
 10. *Id.* — ACT OF GOD. — If the falling of the bridge resulted from an act of God, the company is not liable unless its negligence was a contributing cause of the accident, and in order to charge the company in such a case, it must be guilty of negligence amounting to a want of ordinary care. — *Id.*
- See FRAUD, 4.

NEGOTIABLE INSTRUMENTS. See PROMISSORY NOTE.

NEW CITY HALL. See SAN FRANCISCO.

NEW TRIAL.

1. ERRORS OF LAW — FAILURE TO SPECIFY. — Where the errors of law upon which a motion for new trial was made are not specified in the statement, it will be presumed that they were disregarded by the court on the hearing of the motion. — *Pico v. Cohn*, 258.
2. *Id.* — INSUFFICIENCY OF EVIDENCE — DISCRETION OF THE COURT. — A motion for a new trial on the ground of insufficiency of the evidence to justify the verdict or decision is addressed to the sound legal discretion of the court, and an order granting a new trial will not be reversed on appeal unless it appears that there has been a manifest abuse of discretion. — *Id.*
3. INSUFFICIENCY OF EVIDENCE — VERDICT — APPEAL — DISCRETION. — A motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is addressed to the sound legal discretion of the trial court, and an order granting a new trial on that ground will not be reversed on appeal unless a manifest abuse of discretion appears. — *Gerold v. The J. M. Brunswick & Balke Company*, 124.
4. PRACTICE — SPECIFICATION OF ERRORS. — Where the specification of errors in a statement of the case on motion for a new trial does not comply with the statute, it will be disregarded on appeal; but if a particular error is sufficiently indicated, it will be considered, although the place where it is found is not correctly given, and it is not numbered to correspond with the specification. — *Fleming v. Albeck*, 226.
5. PRACTICE — CUMULATIVE EVIDENCE. — A new trial will not be granted on the ground of newly discovered evidence, where such evidence is merely cumulative. — *Reed v. Drats*, 491.

NEW TRIAL (Continued).

6. **NEWLY DISCOVERED EVIDENCE.**—The defendant moved for a new trial, and one of the grounds of the motion was newly discovered evidence, which consisted of certain letters written by the defendant and by the sheriff of the county in which he was convicted. The letters were relied on as tending to prove the insanity of the defendant. *Held*, that the motion was properly denied. — *People v. O'Neal*, 378.
7. **INCOMPETENT EVIDENCE.**—The admission of incompetent evidence, if not objected to at the trial, cannot be assigned as error on a motion for a new trial. — *Bullard v. Stone*, 477.
8. **NOTICE OF INTENTION.**—A notice of intention to vacate the judgment is not a notice of intention to move for a new trial. — *Little v. Jacks*, 165.
9. **ID.—AMENDMENT OF NOTICE.**—A notice so radically defective cannot be amended after the time allowed by statute for giving notice has expired. — *Id.*
10. **NOTICE OF MOTION—COURT CANNOT EXTEND TIME FOR GIVING.**—The right to move for a new trial is statutory, and neither the court nor a judge thereof has power to extend the time for giving notice of such motion. — *Brichman v. Ross*, 601.
11. **ID.—OBJECTION TO NOTICE—WAIVER—APPEAL.**—An objection that the notice was not given in time must be taken in the lower court, or it will be deemed to have been waived, and the time extended by consent of the parties. Such an objection cannot be raised for the first time in the Supreme Court. — *Id.*
12. **NOTICE OF INTENTION—TIME OF FILING—NOTICE OF DECISION—STATEMENT—APPEAL.**—An appeal from an order refusing a new trial will not be dismissed on the ground that the notice of intention was not filed in time, where the record fails to show that notice of the decision was served on the appellant or his attorney, and no objection was made by the respondent in the lower court to the settlement of the statement on the motion. — *Carpenter v. Hewel*, 589.
13. **INSUFFICIENCY OF EVIDENCE—JUDGMENT—DECISION.**—A motion for a new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, nor on the ground that the judgment is against law. The motion should be directed to the decision and not the judgment. — *Boston Tunnel Co. v. McKenzie*, 485.
14. **ID.—NOTICE—FINDINGS.**—A notice of motion for a new trial, which specifies as a ground for the motion insufficiency of the evidence to support or justify the findings, is a valid notice under section 657 of the Code of Civil Procedure. — *Id.*
15. **MOTION FOR—HEARING AND DETERMINATION OF MOTION A TRIAL.**—The hearing and disposition of a motion for a new trial is a trial within the meaning of section 398 of the Code of Civil Procedure. — *Finn v. Spagnoli*, 330.
16. **ID.—CHANGE OF PLACE OF TRIAL—DISQUALIFICATION OF JUDGE.**—Where pending the settlement of a statement on motion for a new trial, the term of office of the judge who tried the case expires, and one of the attorneys in the action becomes his successor, the party moving for a new trial is entitled, under section 398 of the Code of Civil Procedure, to have the action transferred to an adjoining county, on the ground of the disqualification of the judge before whom the case is pending. — *Id.*
17. **MOTION FOR—DISMISSING PROCEEDINGS—ORDER REFUSING TO SET ASIDE DISMISSAL—EX PARTE APPLICATION.**—An order of the court

NEW TRIAL (Continued).

dismissing the proceedings on a motion for a new trial cannot be set aside on an *ex parte* application. — *Greehn v. Marker*, 364.

See EMINENT DOMAIN, 8; FINDINGS, 6; WATER AND WATER RIGHTS, 8.

NON-RESIDNET. See ALIENS.

NONSUIT. See EJECTMENT, 3.

NOTICE. See ADVERSE POSSESSION, 1; APPEAL, 4; BONA FIDE PURCHASER; INSURANCE, 1; JUSTICES' COURTS, 7-9; MINES AND MINING, 7, 8; NEW TRIAL, 8-12, 14; POSSESSION; TRUST, 4; VENDOR AND VENDEE, 3.

NUISANCE.

1. PUBLIC — OBSTRUCTING SIDEWALK — STREET. — The sidewalks of a public street of a city are parts of the street, and the obstruction thereof is a public nuisance. — *Marini v. Graham*, 130.
2. ID. — ABATEMENT OF — ACTION BY INDIVIDUAL — SPECIAL DAMAGE. — A private individual cannot maintain an action to abate such a nuisance when the injury which he suffers is the same in kind as that sustained by the public, although it may be greater in degree. — *Id.*
3. ID. — LEGALIZED OBSTRUCTION. — A legalized obstruction in the sidewalks of a street is not a nuisance. — *Id.*
4. ACTION TO ABATE — COMMENCED UNDER FORMER CONSTITUTION. — An action to prevent or abate a nuisance under the former Constitution of this State was a case in equity, and where such action was pending in one of the late District Courts at the time of the adoption of the Constitution of 1879, its character as a suit in equity is not changed. — *Learned v. Castle*, 41.

See NAVIGABLE STREAM, 2, 6.

OCCUPATION. See MINES AND MINING, 3; PUBLIC LANDS, 1.

OFFICE AND OFFICERS. See PUBLIC OFFICERS.

ONCE IN JEOPARDY. See CRIMINAL LAW, 2.

OPINION. See EVIDENCE, 3-5.

ORDINANCE. See PLACE OF TRIAL.

OUSTER. See ADVERSE POSSESSION, 1; EJECTMENT, 1.

OVERFLOWED LANDS. See SWAMP AND OVERFLOWED LANDS.

OWNERSHIP. See ATTACHMENT, 3.

PARTIES.

CONTRACT FOR BENEFIT OF ANOTHER — ACTION ON — CONSIDERATION. — One in whose favor a contract is made may maintain an action

PARTIES (Continued).

thereon, although he was not a party to the agreement, and the consideration therefor did not move from him. — *Sacramento Lumber Co. v. Wagner*, 293.

See EJECTMENT, 4; ESTATES OF DECEASED PERSONS, 17; FRAUD, 2; HOMESTEAD, 1; QUIETING TITLE, 1; STREET ASSESSMENT, 1; SWAMP AND OVERFLOWED LANDS, 1.

PARTNERSHIP.

1. WHAT CONSTITUTES. — The plaintiff and defendant purchased certain lands jointly for the purpose of farming and eventually selling the same. Some time after such purchase the parties entered into an agreement by which the plaintiff was to conduct the farming operations, and the defendant to attend to shipping and selling the produce, the parties to share expenses equally, and after paying a reasonable compensation to the plaintiff for his services and the use of his teams and tools, to divide the net proceeds equally between them. *Held*, that these facts constituted a partnership between the parties with respect to the lands and the farming of the same. — *Fisher v. Sweet*, 228.
2. *Id.* — ACTION BETWEEN PARTIES. — A partner cannot maintain an action at law against his copartner to recover his proportion of the partnership proceeds until the accounts of the firm have been settled. — *Id.*
3. ACTION AGAINST — DEFENDANTS NOT SERVED — JUDGMENT. — In an action against copartners on a partnership obligation, where the names of all the individuals composing the firm are set forth both in the caption and the body of the complaint and summons, with the addition that they are doing business under a firm name, judgment cannot be rendered under section 388 of the Code of Civil Procedure against those defendants who have not been served with process and have not appeared; but a judgment entered in such action against those who have been served will not be vitiated as to them because the other defendants are included therein. — *Davidson v. Knox*, 143.
4. APPROPRIATION OF WATER — CONVEYANCE BY PARTNER. — One partner in a water-right acquired by appropriation cannot convey the interest therein of his copartner. — *Henderson v. Nicholas*, 152.
5. ASSUMPTION OF FIRM NOTE — CONSIDERATION. — A promise by one partner to assume the payment of a note executed in favor of the firm, and to charge himself with the amount thereof on the firm books, is a sufficient consideration to sustain a transfer of the note to him by the partnership. — *Wood v. Franks*, 32.
6. BUSINESS DONE UNDER FICTITIOUS NAME — ASSIGNMENT OF PARTNERSHIP CLAIM. — Section 2468 of the Civil Code, requiring partners doing business under a fictitious name to file and publish a certificate of copartnership before they can maintain an action on a partnership demand, does not prevent the assignment by them of a valid partnership claim, although they have not filed or published the required certificate. — *Cheney v. Newberry & Co.*, 126.
7. PLEADING — FICTITIOUS NAME — CERTIFICATE. — The plaintiffs were partners doing business under a designation which did not show the names of the partners. This fact appearing on the face of the complaint, it was alleged that the plaintiffs had filed a certificate as required by section 2468 of the Civil Code. The complaint counted upon a contract made by them in their partnership name. The

PARTNERSHIP (Continued).

allegation as to the filing of the certificate was denied by the answer, and the certificate given in evidence did not comply with the statute. *Held*, that the allegation was essential to the sufficiency of the complaint, and that the plaintiffs could not recover without proving it. — *Sweeney v. Stanford*, 635.

8. **ID. — WHEN FAILURE TO FILE CERTIFICATE A DEFENSE.** — If the facts alleged in the complaint do not bring the case within the provisions of the statute requiring a certificate, the failure to file it is only available by setting it up in the answer as a defense to the action. — *Id.*
9. **ID. — ABATEMENT OF ACTION.** — The effect of failing to file a certificate when required is merely to abate the action. After complying with the statute, a new action may be brought. — *Id.*
See **JOINT DEBTORS.**

PAYMENT. See **TAXATION**, 6, 7.

PAWNBROKERS.

CONSTITUTIONAL LAW — ACT LIMITING RATE OF INTEREST. — The Act of March 7, 1881, amending section 340 of the Penal Code, and making it a misdemeanor for a pawnbroker to charge or receive interest at the rate of more than two per cent per month, is not repugnant to the provision of the Constitution which prohibits the passing of special laws regulating the rate of interest on money. — *Ex parte Lichtenstein*, 359.

PERJURY. See **CRIMINAL LAW**, 22, 23.

PLACE OF TRIAL.

SAN DIEGO — VIOLATION OF CITY ORDINANCE — ACTION TO RECOVER FINE. — An action commenced before a justice of the city of San Diego, under section 12 of the act re-incorporating such city, to recover a fine for a violation of a city ordinance, may be transferred for trial to a justice having his office outside the city. — *Palmer v. Snyder*, 105.

See **NEW TRIAL**, 16.

PLEADINGS.

1. **SEPARATE CAUSES OF ACTION — AMBIGUITY.** — In an action to recover the price of goods sold and delivered, an allegation that a certain further sum is due as interest does not introduce a separate cause of action, or render the complaint ambiguous, unintelligible, or uncertain. — *Friend and Terry Lumber Company v. Miller*, 464.
2. **JUDGMENT, HOW PLEADED — SUPERIOR COURT — JURISDICTION — PRESUMPTION.** — The Superior Court being a court of general jurisdiction, it is not necessary, in pleading a judgment thereof, to aver the facts conferring jurisdiction. They are presumed by law. An allegation that the judgment was recovered in a designated action is sufficient. — *Campø v. Lassen*, 139.
3. **FAILURE TO DENY ALLEGATION — ADMISSION — FINDINGS.** — The failure to deny a material allegation of a complaint is an admission thereof, and a finding to the contrary is erroneous. — *Id.*

PLEADINGS (Continued).

4. CONSTRUCTION OF. — The construction of the pleadings is the duty of the court, and it is error to instruct the jury in such a manner as to leave it for them to determine whether or not the answer denies certain allegations of the complaint. — *Taylor v. Middleton*, 656.
5. ID. — FACT ADMITTED. — The ouster of the plaintiff being admitted by the answer, it is error to instruct the jury that the question of ouster is one of the issues to be tried by them. — *Id.*
6. GUARANTY. — A complaint on a written guaranty purporting to be signed by a firm, the action being against a single defendant, does not state a cause of action as to him without showing that he alone is bound by the guaranty; and it is not sufficient to allege that he agreed to give the guaranty, and that he signed it himself. — *Rose v. Feldman*, 100.
7. COUNTER-CLAIM. — A counter-claim must be denominated as such in the answer in order to be effective. — *Carpenter v. Heuvel*, 589.
8. ID. — EJECTMENT — USE AND OCCUPATION — RENT. — In an action of ejectment, the defendant, after denying the ownership of the plaintiff, and averring title in himself, set up a lease of the premises in controversy by himself to the plaintiff, and an indebtedness by the latter for rent accruing under the lease. *Held*, that such indebtedness could not be pleaded as a counter-claim. — *Id.*
9. COUNTER-CLAIM — JOINDER OF CAUSES OF ACTION — DEMURRER. — In an action founded on contract, an answer which joins by way of counter-claim, causes of action for goods, wares, and merchandise sold and delivered, for money paid, laid out, and expended, and for money had and received, is not demurrable under the Code, if such pleading would have been sufficient as a declaration at common law. — *Clay v. Carroll*, 19.
10. EJECTMENT — EQUITABLE DEFENSE. — In an action of ejectment, where the plaintiff has the legal title, and the defendant is in possession under a contract of purchase from one under whom the plaintiff claims, and has fully complied with the terms of the contract, the equitable title thus vested in the defendant may be pleaded in defense of the action. The facts constituting the defense must be fully stated in the answer, but a prayer for equitable relief is not required, nor is it material that the defendant may by lapse of time or other cause have lost his right to such relief. — *Arguello v. Bours*, 447.
11. EQUITY. — Upon a construction of the pleadings, *held*, that the action was equitable. — *Scott v. Sierra Lumber Co.*, 71.

See AMENDMENT, 1; CONVERSION; DEMURRER; EJECTMENT, 2; EMINENT DOMAIN, 2, 5, 11; ESTATES OF DECEASED PERSONS, 17, 18, 21; ESTOPPEL; FINDINGS, 1-4; FRAUD, 3; INJUNCTION; INSURANCE, 10; JOINT DEBTORS; JUDGMENT, 1; LIBEL, 1; LOGGER'S LIEN; MANDAMUS; MARRIED WOMEN, 3; MORTGAGE, 10, 12; NEGLIGENCE, 3; PARTNERSHIP, 7; PUBLIC OFFICERS, 3; SLANDER; STATUTE OF LIMITATIONS, 1; SURETYSHIP, 3.

POLICY. See INSURANCE.

POSSESSION.

WHEN IMPARTS NOTICE. — Possession of land, in order to impart notice of the rights and equities of the holder, must be actual, open, exclusive, notorious, and visible. — *Taylor v. C. P. R. R. Co.*, 615.

POSSESSION (Continued).

See ADVERSE POSSESSION; ATTACHMENT, 2, 3; DEED, 9, 12; EJECTMENT, 1, 4; FORCIBLE DETAINER; HOMESTEAD, 1-4; INSURANCE, 5; MINES AND MINING, 3, 9; PUBLIC LANDS, 2; SALE, 4-6; VENDOR AND VENDEE, 3.

PRACTICE.

STIPULATION TO ABIDE DETERMINATION OF ANOTHER CAUSE — FINAL JUDGMENT. — Where two causes alike in every material respect, and having the same attorneys on both sides, are pending in the same court, a stipulation that one of them shall abide the determination of the other, and that final judgment may be entered in accordance with such determination, does not lose its effect for the reason that a judgment rendered in the other case is reversed on the ground of error in overruling a demurrer to the complaint, the pleadings in that case being thereupon amended without making any substantial change in the issues and final judgment obtained on the merits. — *Gilmore v. American Central Insurance Company*, 386.

See AMENDMENT; APPEAL; APPEARANCE; BILL OF EXCEPTIONS; DEMURRER; EMINENT DOMAIN, 3, 4; FINDINGS; INSTRUCTIONS; JUDGMENT; MANDAMUS; MORTGAGE, 5; NEW TRIAL; PARTNERSHIP, 3; SUMMONS; VERDICT; WILL, 3-6.

PRE-EMPTION. See PUBLIC LANDS, 1.

PRESCRIPTION. See BOUNDARIES.

PRESUMPTIONS. See ATTORNEYS AT LAW, 1; CORPORATIONS, 12; CRIMINAL LAW, 4, 16; DEED, 3, 4, 7; EMINENT DOMAIN, 9; ESTATES OF DECEASED PERSONS, 10; WITNESS, 3.

PRINCIPAL AND AGENT. See INSURANCE, 1, 2, 6, 9; STATUTE OF FRAUDS, 3.

PRIOR CONVICTION. See CRIMINAL LAW, 2, 3.

PRIORITY. See EXECUTION, 3.

PROBATE. See ESTATES OF DECEASED PERSONS; WILL.

PROHIBITION. See CONTEMPT, 1.

PROMISSORY NOTE. See CORPORATIONS, 8; INSOLVENCY, 6; INTEREST; MARRIED WOMEN, 2; SURETYSHIP, 3.

PUBLICATION. See ESTATES OF DECEASED PERSONS, 1; INSOLVENCY, 5.

PUBLIC LANDS.

1. OCCUPANT OF UNSURVEYED — PRE-EMPTION — DEATH OF OCCUPANT — RIGHT OF HEIRS. — A mere occupant of unsurveyed public lands of the United States, who has taken none of the steps required by

PUBLIC LANDS (Continued).

- law for its pre-emption, has a mere privilege of pre-emption. Such a privilege is not an estate legal or equitable in the land, and upon the death of the occupant it does not descend to his heirs, nor clothe them with an equitable right to control the patent to the land subsequently issued by the United States upon an entry made by another. — *Buxton v. Traver*, 171.
2. **DESERT LAND — ENTRY — RIGHT OF POSSESSION.** — Desert land duly entered under the Act of Congress of March 3, 1877, and on which twenty-five cents per acre has been paid, is reserved from entry under other laws, and the intended purchaser has the right of possession for three years from the date of his entry. — *Sallee v. Corder*, 174.
 3. **STATE LANDS — AFFIDAVIT FOR PURCHASE.** — The affidavit accompanying an application for the purchase of State lands, other than a sixteenth or thirty-sixth section, must state the facts required by section 3500 of the Political Code; otherwise the applicant acquires no right to purchase. — *Millidge v. Hyde*, 5.

PUBLIC OFFICERS.

1. **VACANCY BY NON-USER — VOLUNTARY SURRENDER BY INCUMBENT.** — A public office becomes vacant by non-user, and subject to be filled by the appointing power, when the lawful incumbent voluntarily surrenders the office to another under the mistaken belief that the latter had been elected as, and was his rightful successor, and acting upon such belief for a period of two years ceases to discharge the duties of the office, and makes no demand of the person to whom he had surrendered it to be restored thereto. — *People ex rel. McGarvey v. Hartwell*, 11.
2. **DEPUTY COUNTY CLERK OF SAN FRANCISCO — SALARY.** — The salary of a court-room and register clerk of the Superior Court of the city and county of San Francisco is fixed at \$175 per month, by the Acts of February 13, 1880, and of April 2, 1880. — *Burke v. Edgar*, 182.
3. **ID. — MANDAMUS — COURT-ROOM CLERK — APPOINTMENT MUST BE ALLEGED.** — In a proceeding for a writ of mandate brought by a deputy of the county clerk of the city and county of San Francisco to compel the auditor to allow his claim for salary as a court-room or register clerk, the petition must allege and the court must find that the petitioner had been appointed or assigned to such position. An allegation that he had acted in the capacity and performed the services of a court-room or register clerk is not sufficient. — *Id.*
4. **ID. — DE FACTO OFFICER CANNOT RECOVER SALARY.** — A *de facto* officer cannot recover the salary annexed to the office as the salary is incident to the title to the office and not to its occupation and exercise. — *Id.*
5. **COUNTY ASSESSOR OF ALAMEDA COUNTY — ACT OF FEBRUARY 10, 1874, ABOLISHING.** — The Act of February 10, 1874, abolishing the office of county assessor of Alameda County, and creating the office of township assessor, is constitutional. Such act was not repealed by the Act of March 7, 1881, amending section 4109 of the Political Code. — *Rosborough v. Boardman*, 116.
6. **ID. — COUNTY GOVERNMENT ACT.** — After the passage of the Act of January 10, 1874, and until the first Monday after the 1st day of January, 1885, the date on which the provisions of the County

PUBLIC OFFICERS (Continued).

Government Act of March 14, 1883, creating county offices, took effect, there was no such office as county assessor of Alameda County. — *Id.*

7. **VACANCY IN, HOW CREATED.** — A public office does not become vacant except upon the happening of one of the events enumerated in section 996 of the Political Code. — *Id.*
8. **COUNTY OFFICER — CONTRACT WITH SUPERVISORS FOR EXTRA COMPENSATION — WHEN VALID.** — A contract by which the board of supervisors of a county employ the district attorney of the county for a special compensation to attend to the interests of the county in a suit which is to be tried in another county after the expiration of his term of office, does not increase his salary as district attorney; and if the contract is made in good faith, it is not void. — *Jones v. Morgan*, 308.

See **APPEAL, 6: ELECTION; SAN FRANCISCO, 2.**

PUBLIC USE. See **EMINENT DOMAIN; WATER AND WATER RIGHTS, 1.**

QUIETING TITLE.

1. **ACTION TO QUIET TITLE — HEIRS MAY MAINTAIN OR DEFEND — JOINDER OF ADMINISTRATOR — DISMISSAL.** — An action to quiet title to land, under section 1452 of the Code of Civil Procedure, may be maintained or defended by the heirs of a deceased intestate in their own name, without joining the administrator; and where the administrator is originally joined as a defendant with the heirs, and judgment is rendered against them, an order dismissing a motion for a new trial as to the administrator is without injury to the heirs. — *Tryon v. Huntoon*, 325.
2. **ACTION TO QUIET TITLE — LEGAL TITLE IN GOVERNMENT.** — An action to quiet title to lands is maintainable in this State, although the legal title thereto is in the government of the United States. — *Orr v. Stewart*, 275.

See **SWAMP AND OVERFLOWED LANDS, 4; TAXATION, 5.**

QUO WARRANTO. See **CORPORATIONS, 11.**

RAILROAD. See **CORPORATIONS, 4; EMINENT DOMAIN, 3-7, 12; NEGLIGENCE, 3, 10; TAXATION, 8.**

RAPE. See **CRIMINAL LAW, 24.**

RATIFICATION. See **SURETYSHIP, 2.**

REAL ESTATE. See **LANDS.**

RECLAMATION OF SWAMP LANDS. See **CORPORATIONS, 9, 11; SWAMP AND OVERFLOWED LANDS.**

RECORD. See **JUDGMENT, 7, 8.**

RECORDING. See **MORTGAGE, 4; TRUST, 4.**

REFORMATION. See **MISTAKE.**

RELATION. See EXECUTION, 3.

RELEASE. See CONVERSION.

RENTS AND PROFITS. See MORTGAGE, 9; PLEADINGS, 8.

REPLEVIN. See ATTACHMENT, 2; CLAIM AND DELIVERY; MARRIED WOMEN, 3, 4.

RESERVATION. See MINES AND MINING, 1, 2.

RESERVOIR. See EMINENT DOMAIN, 1.

RESIDENCE. See SUMMONS.

RIGHT OF WAY. See EMINENT DOMAIN, 3-5.

ROADS.

ROAD LAWS — CONSTITUTION. — The road laws retained by the Code having been in force before the adoption of the present Constitution, are not affected by the provision against special legislation. — *Meade v. Watson*, 591.

ROBBERY. See CRIMINAL LAW, 8.

SALARY. See PUBLIC OFFICERS, 2, 3, 8.

SALE.

1. MANUFACTURED ARTICLE — IMPLIED WARRANTY. — Under sections 1769 and 1770 of the Civil Code, one who sells or agrees to sell an article of his own manufacture, thereby warrants it to be free from any latent defect not disclosed to the buyer, arising from the process of manufacture, and also that neither he nor his agent in such manufacture has knowingly used improper materials therein; and one who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for such purpose. — *Hoult v. Baldwin*, 610.
2. *Id.* — EXPRESS WARRANTY OF FITNESS — BREACH OF BY SELLER — RESCISSION BY BUYER. — Upon a breach by the seller of either of such implied warranties, or upon a breach by him of an express warranty that the article manufactured and sold would do good work of a particular kind, the buyer has a right to rescind the sale by returning or offering to return the article to the seller. — *Id.*
3. *Id.* — GUARANTY — WHEN PART OF CONTRACT. — The machine in question was manufactured and sold by the plaintiffs on the order of an agent of the defendant. At the time of the order, the plaintiffs notified the defendant that they intended to deliver the machine upon the curs, and that their responsibility, so far as the working thereof was concerned, should then cease. The defendant refused to accept it upon these terms, and demanded a guaranty that it would do good work. The plaintiffs thereupon executed and forwarded to him a written guaranty to that effect. *Held*, that the guaranty was a part of the contract of sale, and supported by a sufficient consideration. — *Id.*

SALE (Continued).

4. ACTUAL AND CONTINUED CHANGE OF POSSESSION — EVIDENCE. — Upon a review of the evidence, *held*, that the sale under which the plaintiff claimed title to the personal property in question was void as to the creditors of his vendor, because unaccompanied by an actual and continued change of possession. — *Bell v. McClellan*, 283.
5. CHANGE OF POSSESSION — IMMEDIATE DELIVERY — CREDITOR, WHEN ESTOPPED TO DENY. — A creditor of a vendor of personal property is estopped to deny that the sale was followed by an immediate delivery and continued change of possession, if after the sale he recognized the title of, and caused the property to be delivered to the vendee, and upon the faith of such acts, the vendee took the property and expended money in its care, which otherwise he would not have done. — *Escolle v. Franks*, 137.
6. TRANSFER OF PERSONAL PROPERTY — CONSIDERATION — CHANGE OF POSSESSION. — A transfer of personal property, in consideration of a promise by the transferee to use it for a public purpose, in such a manner that the transferor will derive pecuniary profit from its use, is good as against the creditors of the transferor, if accompanied by an actual, immediate, and continued change of possession. — *Levin v. Hopping*, 541.

See MEASURE OF DAMAGES; MORTGAGE, 1, 2; TAXATION, 1-5.

SAN FRANCISCO.

1. NEW CITY HALL — SAN FRANCISCO — ACT OF MARCH 24, 1876 — CONSTITUTIONAL LAW — SPECIAL LEGISLATION. — The Act of March 24, 1876, providing for the completion of the building known as the New City Hall in the city and county of San Francisco, is constitutional. The act is not an attempt by special legislation to deprive the supervisors of their discretion with respect to a local improvement. — *People v. Bartlett*, 156.
2. *Id.* — NEW CITY HALL COMMISSIONERS — TERM OF COMMISSION. — Under this act the new city hall commission continues in existence until the amounts raised by taxation for the new city hall funds have been expended under contract made by the commissioners. — *Id.*

SATISFACTION. See CONTEMPT, 2.

SECURITY. See ASSIGNMENT; LOGGER'S LIEN; MORTGAGE.

SEPARATE PROPERTY. See MARRIED WOMEN, 3-6.

SHERIFF. See COUNTIES, 4.

SIDEWALK. See NUISANCE, 1, 3.

SLANDER.

1. WORDS NOT ACTIONABLE PER SE — PLEADING EXTRANEOUS FACTS — BURDEN OF PROOF — EVIDENCE. — In an action for slander, where the complaint shows that the words spoken were not actionable *per se*, and alleges extraneous facts showing their slanderous meaning, the plaintiff must prove such extraneous facts, and the defendant may give evidence to the contrary under a general denial. — *Nidever v. Hall*, 79.

SLANDER (Continued).

2. **ID. — UNDERSTANDING OF WORDS BY HEARERS.** — In such a case, the plaintiff must aver and prove that the words were actually used in their actionable sense, and were applied to him, and that the hearers so understood them. Upon this latter point, the testimony of the hearers, as to how they understood the words, is admissible. — *Id.*

SPECIFICATION OF ERROR. See BILL OF EXCEPTIONS.

SPECIFIC PERFORMANCE. See EJECTMENT, 2; EVIDENCE, 9.

STATE LANDS. See PUBLIC LANDS, 3.

STATEMENT OF CASE. See APPEAL, 9.

STATUTE OF FRAUDS.

1. **CONTRACT TO PURCHASE AND SELL STOCK.** — A contract between brokers, whereby one agrees to purchase and sell stocks for the account of the other, to advance money for the purpose, and pay assessments on the stocks purchased, is not obnoxious to section 28, article iv., of the Constitution, and is not required by the statute of frauds to be in writing. — *Kutz v. Fleisher*, 93.
2. **DIVISION LINE — PAROL AGREEMENT.** — A parol agreement between co-terminous proprietors of land that a surveyor should run a line between their respective tracts, and that such line should become the division line, is invalid under the Statute of Frauds. — *Sharp v. Blankenship*, 441.
3. **CONTRACT — SALE OF REAL ESTATE — COMMISSION.** — An agent employed to exchange real estate cannot recover any compensation or commission for his services in that behalf unless the services were performed under a contract in writing subscribed by the principal. — *Myres v. Surryhne*, 657.
4. **AGREEMENT — REAL ESTATE.** — An oral agreement under which the defendant advanced money for the plaintiff to pay certain instalments upon a contract for the purchase of land, the defendant being named in the contract as the purchaser, but really acting for the plaintiff in pursuance of the agreement, *held*, to be valid, and not within the Statute of Frauds. — *Walton v. Karnes*, 255.

See INSOLVENCY, 1; MARRIED WOMEN, 1; SURETYSHIP, 1.

STATUTE OF LIMITATIONS.

1. **PLEADING — FINDING.** — The Statute of Limitations was pleaded by specifying certain sections of the Code of Civil Procedure as a bar to the action. The court found that the action was not barred by the statute or by the sections of the Code so specified. *Held*, that the finding was sufficient. — *Oakland Gas Light Company v. Dameron*, 663.
2. **MUTUAL ACCOUNT.** — The action being regarded by the court as one to recover a balance due on a mutual, open, and current account, *held*, that the Statute of Limitations was not a bar. — *Kutz v. Fleisher*, 93.

STATUTE OF LIMITATIONS (Continued).

See ADVERSE POSSESSION; CONVERSION; DEED, 9; ESTATES OF DECEASED PERSONS, 12-14; HOMESTEAD, 1; MUNICIPAL CORPORATIONS, 2; WATER AND WATER RIGHTS, 5.

STIPULATION. See PRACTICE.

STOCK AND EXCHANGE BOARD. See ASSOCIATIONS.

STREET ASSESSMENT.

1. STREET ASSESSMENT IN SACRAMENTO—FORECLOSURE UNDER ACT OF MARCH 16, 1864—PLAINTIFF—JUDGMENT.—The people of the State of California, and not the city of Sacramento, is the proper plaintiff in an action brought under the Act of March 16, 1864, to foreclose a street assessment in the city of Sacramento. If such an action be brought in the name of the city as plaintiff, the judgment therein is void, although rendered in favor of the people of the State as well as the city.—*Sullivan v. Mier*, 265.
2. *Id.*—ACT OF MARCH 16, 1864, CONSTITUTIONAL.—The provision of the Act of March 16, 1864, requiring the action to be brought in the name of the people of the State of California, is constitutional.—*Id.*

STREETS. See NUISANCE, 1-3.

SUMMONS.

PRACTICE—SERVICE OF—RESIDENCE OF DEFENDANTS.—An affidavit which shows that the summons was served on the defendants in the same county, and that a copy of the complaint was served on one of them, need not state that all the defendants were residents of the county.—*Pellier v. Gillespie*, 582.

See APPEARANCE; ESTATES OF DECEASED PERSONS, 1; JUSTICES' COURTS, 3; PARTNERSHIP, 3.

SUPREME COURT. See APPEAL, 7; DIVORCE, 1, 2.

SURETYSHIP.

1. INDEMNITY—VERBAL PROMISE—SURETIES—STATUTE OF FRAUDS—CONSIDERATION.—The defendants were sureties on an undertaking to stay execution on an appeal from a judgment of a Justice's Court. The appeal having been dismissed, they requested the plaintiff, a constable, to levy execution upon and sell certain personal property which they represented belonged to the judgment debtor, and verbally promised to indemnify him for any damage he might sustain by reason of the levy and sale, should they prove to be wrongful. The plaintiff, in consideration of such promise, levied upon and sold the property and thereby satisfied the judgment. *Held*, that the promise was founded upon a sufficient consideration, and was not within the Statute of Frauds.—*Lerch v. Gallup*, 595.
2. *Id.*—EXECUTION ISSUED WITHOUT AUTHORITY OF JUDGMENT CREDITOR—RATIFICATION.—The execution was issued at the request of the sureties, but the money arising from the sale was received

SURETYSHIP (Continued).

by the judgment creditor in satisfaction of the judgment. *Held*, that the receipt of the money was a ratification of the act of the sureties. — *Id.*

3. REIMBURSEMENT — PLEADING. — In an action by a surety on a promissory note against his principal for reimbursement, the suretyship not appearing on the face of the note, a complaint which avers that the plaintiff signed the note as a surety only, and for the accommodation of the defendant, need not allege a request from the defendant to the plaintiff to pay the same. — *Clanton v. Coccard*, 373.
4. SURETIES — JUDGMENT AGAINST — PAYMENT — RECOURSE AGAINST PRINCIPAL. — Sureties who have been compelled to pay a debt of their principal have a legal demand for reimbursement, which they may enforce against the principal by personal action if he be alive, or against his estate if he be dead. But in either case reimbursement can only be had for what has been expended. — *Estate of Hill*, 238.
5. *Id.* — SURETIES MUST PAY BEFORE PROCEEDING AGAINST PRINCIPAL. — After the death of the principal, a judgment obtained against the sureties cannot be enforced by them as a claim against his estate until they have paid it. — *Id.*

See APPEAL, 5; BOND; JUSTICES' COURTS, 6.

SWAMP AND OVERFLOWED LANDS.

1. RECLAMATION OF — DELINQUENT ASSESSMENT — PLAINTIFF IN ACTION TO RECOVER. — A reclamation district, as the real party in interest, may sue in its own name to recover delinquent assessments for the reclamation of swamp lands. — *Reclamation District No. 3 v. Partin*, 501.
2. *Id.* — VIEWING AND ASSESSING BY COMMISSIONERS. — Section 33 of the Act of March 28, 1868, requiring the commissioners to "jointly view and assess upon each and every acre to be reclaimed or benefited thereby a tax," etc., means that the three commissioners, acting jointly or together, shall view and assess, etc. — *Id.*
3. AGREEMENT TO PURCHASE FOR BENEFIT OF ANOTHER — CERTIFICATE OF PURCHASE. — An agreement to acquire swamp and overflowed lands from the State, for the use and benefit of a person other than the applicant, is void under the Act of April 27, 1863. The parties to such an agreement are *in pari delicto*, and after the certificate of purchase has come into the possession of the party for whose benefit the application to purchase was made, the applicant cannot maintain an action to compel its specific delivery to him. — *McGregor v. Donelly*, 149.
4. GRANT BY CONGRESS — PATENT — ACTION TO QUIET TITLE. — In an action to quiet title based upon a patent purporting to have been issued in pursuance of the grant by Congress to the Southern Pacific Railroad Company, the defendant may show that the land included in the patent was swamp and overflowed land, and therefore excepted from the congressional grant. — *Southern Pacific Railroad Company v. McCusker*, 67.

See CORPORATIONS, 9, 11; TAXATION, 3-5.

TAXATION.

1. SALE FOR EXCESSIVE AMOUNT — JURISDICTION. — A tax sale for an amount in excess of what is lawfully chargeable is without jurisdiction and void. — *Boston Tunnel Co. v. McKenzie*. 485.

TAXATION (Continued).

2. **SALE FOR EXCESSIVE AMOUNT.** — A tax sale for one dollar in excess of the amount authorized by law is void. — *Aztell v. Gerlach*, 483.
3. **ID. — LANDS SUBJECT TO OVERFLOW — ACT OF APRIL 15, 1880 — ILLEGAL CHARGES.** — On a sale for taxes levied under the Act of April 15, 1880, providing for the protection of lands subject to overflow, an item of fifty cents for the cost of preparing the delinquent list, and an item of fifty cents for the cost of the certificate of sale, included in the amount for which the sale was made, are illegal charges, and fatal to the validity of the sale. — *Id.*
4. **ID. — INJUNCTION TO RESTRAIN EXECUTION OF DEED.** — In such a case, the execution of a deed to the purchaser will be restrained by injunction, for the reason that the items included in the amount for which the sale was made are not required to be specified, therein. — *Id.*
5. **ID. — QUIETING TITLE — CANCELLATION OF CERTIFICATE OF SALE — JUDGMENT.** — Assuming that the deed when executed would show the invalidity of the sale, the owner of the land may maintain an action to quiet his title and cancel the certificate to the purchaser, and a judgment granting such relief, and also enjoining the execution of a deed, will not be reversed because the deed would cast no cloud upon the title. — *Id.*
6. **LICENSE TAX — VOLUNTARY PAYMENT OF.** — Money voluntarily paid in satisfaction of an illegal license tax cannot be recovered back. — *O'Brien v. Colusc County*, 503.
7. **ID. — POWER OF SUPERVISORS.** — Section 3804 of the Political Code does not authorize the board of Supervisors of a county to order a license tax erroneously or illegally collected to be refunded by the county treasurer. — *Id.*
8. **MUNICIPAL GRANT — LICENSE TAX.** — The grant by the city of Los Angeles to the defendant of the right to maintain and operate its road within the city limits, *held*, not to exempt it from the payment of the license tax imposed upon steam railroads carrying on their business within the city. — *Los Angeles v. Southern Pacific Railroad Company*, 433.
9. **IMPROVEMENTS ERECTED ON LANDS LEASED FROM MUNICIPALITY.** — For the purpose of taxation, improvements erected by a lessee upon lands owned by and leased from a municipal corporation are regarded as the property of the lessee. — *City and County of San Francisco v. McGinn*, 110.
10. **CONSTITUTIONAL LAW — ASSESSMENT — EQUALIZATION.** — Section 9 of the Act of March 18, 1874, authorizing an assessment for taxes in the city and county of San Francisco, after the time within which the board of supervisors can meet for the purpose of equalization, violates both the State Constitution and the fourteenth amendment to the Constitution of the United States, and its validity may be attacked even by one who has failed to furnish the statement required by section 3629 of the Political Code. — *People v. Pittsburg Railroad Company*, 625.
See CONSTITUTIONAL LAW, 2; MORTGAGE, 12; SAN FRANCISCO, 2.

TENANCY AT WILL. See EJECTMENT, 3.

TENDER.

INSUFFICIENT AMOUNT. — A tender is not invalidated by insufficiency in the amount tendered, if no objection be made at the time as to the amount. — *Oakland Bank of Savings v. Applegarth*, 86.

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TITLE. See **ADVERSE POSSESSION**, 2; **BOUNDARIES**; **DEED**, 6, 9, 13; **EXECUTION**, 3; **FRAUD**, 1; **MORTGAGE**, 7; **PLEADINGS**, 10; **QUIETING TITLE**; **TAXATION**, 5; **TRUST**, 2; **VENDOR AND VENDEE**, 4.

TRANSFER. See **DEED**; **INSOLVENCY**, 1; **SALE**.

TRESPASS.

1. **MINING CLAIM — MEASURE OF DAMAGES.** — The measure of damages in an action for trespass on a mining claim is the amount of money that will fully compensate the plaintiff for all detriment proximately caused by the trespass. — *Empire Gold Mining Company v. Bonanza Gold Mining Company*, 406.
2. **ID. — NOMINAL DAMAGES.** — The trespass being proved, the law presumes nominal damages; and the defendant cannot justify his act, and obtain a verdict, by showing that the value of the ore extracted from the claim was less than the expense of extracting it. — *Id.*

See **MUNICIPAL CORPORATIONS**.

TRUST.

1. **ESTATE OF DECEASED PERSON — INTERPRETATION — DISTRIBUTIVE SHARE.** — A testator left all his property in trust to be distributed among his heirs, the children of a deceased sister and those of a deceased brother. *Held*, that under the provisions of the trust the children were to take the property in equal shares, and not by way of representation. — *De Laurencel v. De Boom*, 362.
2. **EQUITY — RESULTING.** — Where in a purchase of land one person pays the consideration and another takes the title, a trust results in favor of the person paying the consideration; and where only a part of the consideration is paid by him a trust arises in his favor *pro tanto*. — *Somers v. Overhulser*, 237.
3. **SALE BY TRUSTEE — PURCHASE FOR BENEFIT OF TRUSTEES — FRAUD.** — Where a deed of trust authorizes the trustees upon default to sell the trust property at public auction for cash, a sale to a third person who purchased in pursuance of an agreement with the trustees that he should pay nothing for the property, and should hold it subject to the direction of the trustees, is fraudulent, and will be set aside at the instance of a party beneficially interested in the proceeds of the sale. — *Scott v. Sierra Lumber Company*, 71.
4. **ID. — RECORDING — CONSTRUCTIVE NOTICE.** — Where a deed of trust conveys both real and personal property the recording thereof as a conveyance of real estate does not operate as constructive notice of the transfer of the personal property. — *Id.*
5. **RESULTING — ACTION TO ENFORCE — EVIDENCE — ESTATE OF DECEDENT.** — An action to enforce a resulting trust against the personal representatives of a deceased trustee is not founded upon a claim or demand against the estate of the deceased, within the meaning of section 1880 of the Code of Civil Procedure. In such an action, the original *cestui que trust* may testify to facts occurring prior to the death of the trustee. — *Myers v. Reinstein*, 89.

See **DEED**, 7; **VENDOR AND VENDEE**, 4.

ULTRA VIRES. See **CORPORATIONS**, 8.

UNDERTAKING ON APPEAL. See **APPEAL**, 5-7; **DIVORCE**, 4; **JUSTICES' COURTS**, 4-6; **SURETYSHIP**, 1, 2.

UNDERTAKING ON ARREST. See ARREST.

USE AND OCCUPATION. See PLEADINGS, 8.

VACANCY. See PUBLIC OFFICERS, 1, 7.

VALUE. See EVIDENCE, 4.

VARIANCE. See CRIMINAL LAW, 4; NEGLIGENCE, 3.

VENDOR AND VENDEE.

1. CONTRACT FOR PURCHASE OF LAND—ACTION TO ENFORCE—FINDINGS.—The action was brought by the plaintiffs, suing as husband and wife, to compel the defendant Davis to assign a contract for the purchase of certain land owned by the Central Pacific Railroad Company, and to require the company to convey the land to them. The plaintiffs claimed to have a prior right to purchase the land under an alleged contract entered into by the company with the wife, which contract was founded upon an alleged acceptance of, and compliance with the conditions of a circular issued by the company. The court found that the company had issued a circular in which it invited persons to settle upon and improve its lands, and promised that those so doing, and who should file applications therefor, should be preferred purchasers. The court further found that no application to purchase had been filed by the wife, and that she never settled upon or improved the land, as required by the circular. *Held*, that the findings were sustained by the evidence.—*Taylor v. C. P. R. R. Co.*, 615.
2. ID.—EVIDENCE—DECLARATIONS OF VENDOR.—On the trial of the action, the plaintiffs offered to prove certain declarations made by the officers of the company in reference to a sale of the land. It did not appear from the offer whether the declarations were made before or after the execution of the contract for the purchase by the defendant Davis, nor was he shown to have been present at or to have had any knowledge of the declarations. *Held*, that the evidence was properly rejected.—*Id.*
3. ID.—NOTICE—POSSESSION.—The defendant Davis testified that at the time of his contract to purchase, he had no knowledge that any portion of the land had been enclosed by the plaintiffs, or that they had made any application for the purchase thereof. *Held*, that the evidence was admissible as tending to show that the defendant had no notice of the alleged equities of the plaintiffs.—*Id.*
4. ID.—DEFAULT—JUDGMENT—TRUSTEE—LEGAL TITLE.—The company having failed to answer, its default was entered, and findings and a judgment were subsequently rendered in favor of the defendant Davis. *Held*, that the company was a trustee, holding the legal title to the land for him, and that if the plaintiffs were not entitled to relief as against him, they could not enforce a deed from his trustee.—*Id.*

VERDICT.

1. PRACTICE—CONFLICT OF EVIDENCE.—Where there is a substantial conflict in the evidence, a verdict will not be disturbed on the ground of insufficiency of the evidence to sustain it.—*Clanton v. Conard*, 373.

VERDICT (Continued).

2. **Id.** — **POWER TO REMIT EXCESS.** — The court may allow the plaintiff to remit from a verdict an excess over and above the amount demanded in the complaint, and to take judgment accordingly. — *Id.*
See **CRIMINAL LAW**, 10; **EJECTMENT**, 2; **JUDGMENT**, 9.

VERIFICATION. See **CRIMINAL LAW**, 22; **ESTATES OF DECEASED PERSONS**, 8.

VOLUNTARY ASSOCIATIONS. See **ASSOCIATIONS**.

WAIVER. See **CRIMINAL LAW**, 12; **EXECUTION**, 1, 2; **FINDINGS**, 6; **INSURANCE**, 2, 8, 9; **JURY AND JURORS**, 1; **NEW TRIAL**, 11.

WARRANTY. See **SALE**, 1, 2.

WATCHMAN. See **INSURANCE**, 4, 10.

WATER AND WATER RIGHTS.

1. **SALE AND DISTRIBUTION — PUBLIC USE — FRANCHISE.** — A person engaged in furnishing water to the inhabitants of a city under a franchise permitting him to lay pipes through the streets for that purpose and to sell the water, cannot without reasonable cause shut off the water from one of such inhabitants who is using the same at a fixed rate. The use of water appropriated for sale, rental, or distribution is a public use, and the right to collect rates or compensation for the use of water furnished to the inhabitants of a city is a franchise which can only be exercised by authority of and in the manner prescribed by law. — *McCrary v. Beaudry*, 120.
2. **APPROPRIATION.** — A subsequent appropriator of water from a natural stream has no right to destroy the ditch of a prior appropriator, or to materially diminish the quantity or deteriorate the quality of the water to which the latter is entitled. — *Junkans v. Bergin*, 267.
3. **Id.** — **POINT OF DIVERSION MAY BE CHANGED.** — One entitled to divert a quantity of water from a stream may take it at any point on the stream, and may change the point of diversion at pleasure, if the rights of other appropriators be not injuriously affected by the change. — *Id.*
4. **Id.** — **FINDING — EVIDENCE.** — On a review of the evidence, *held*, that a finding of the court below as to the carrying capacity of the ditch of the plaintiff, and the amount of water to which he was entitled by appropriation, was justified, and that the defendants had diverted a portion of the water to which the plaintiff had a prior right. — *Id.*
5. **APPROPRIATION — STATUTE OF LIMITATIONS — EVIDENCE IN REBUTTAL.** — In an action to restrain the diversion of water, the plaintiff having shown a prior appropriation of the water right by himself, which the defendant attempts to defeat by the plea of the Statute of Limitations, should be permitted to show in rebuttal that the defendant before any bar of the statute could have attached had acknowledged his claim and sought to become his lessee of the water right. — *Ledu v. Jim Yet Wa*, 346.

WATER AND WATER RIGHTS (Continued).

6. **ID. — ADVERSE POSSESSION — INSTRUCTIONS.** — Where the defendant has pleaded adverse possession in himself, it is error to instruct the jury "that if they believe that the plaintiff was the first to appropriate and use the waters in dispute, and that his appropriation and use thereof was prior to that of defendant and those under whom he claims adversely to the plaintiff, and that his possession was continuous, exclusive, and notorious, and that he has not parted with his right thereto or forfeited the same, they will find for the plaintiff," for the reason that the instruction would authorize the jury to find for the plaintiff without considering the defense of adverse possession. — *Id.*
7. **DIVERSION — NATURAL CHANNEL.** — The diversion of water from a water-course will not be restrained at the suit of one who owns land located on another water-course to which the former is an occasional tributary, unless such diversion diminishes the quantity of water which would otherwise have flowed into the other water-course by a natural channel, and shortens the period of the natural flow, and it will be restrained only as to such quantity and period. — *Creighton v. Kaweah Canal and Irrigation Company*, 221.
8. **JUDGMENT — NEW TRIAL — EVIDENCE — FINDINGS.** — The matters in issue related to the rights of the respective parties to the waters of a certain stream. The judgment determining such rights and an order refusing a new trial affirmed on the evidence and findings of the court. — *Louden v. Frey*, 474.

See **ASSIGNMENT**, 2; **EMINENT DOMAIN**, 1; **INJUNCTION**; **MUNICIPAL CORPORATIONS**, 1; **NAVIGABLE STREAM**.

WHARF. See **NAVIGABLE STREAM**, 1, 2.

WILL.

1. **DEED OF GIFT.** — An instrument purporting to be a deed of gift, but inoperative for want of delivery, cannot, in the absence of proper evidence that a testamentary disposition was intended, be admitted to probate as a will. — *Estate of Skerrett*, 585.
2. **ID. — CERTAIN INSTRUMENTS CONSTRUED AS A WILL.** — Two instruments in the handwriting of the deceased, attached together, and found among his papers, one being in the form of a letter signed by him and addressed to his sister, and the other purporting to be a copy of a deed of gift from the former to the latter, and it appearing on the face of the letter that the property described in the deed was intended by the deceased as a provision for the sister after his death, held, to be a will and admissible to probate. — *Id.*
3. **CONTESTING PROBATE — JURY TRIAL.** — In a contest as to the probate of a will, where a jury was impaneled to try the issues, the contestants were not prejudiced by the action of the court in submitting to the jury certain issues proper in themselves, but amounting substantially to a repetition of others presented by them and allowed by the court, and on which the jury found against them. — *Estate of Dalrymple*, 444.
4. **ID. — PRACTICE — ORDER OF PROOF.** — In such a case, the contestants are plaintiffs, and have the affirmative of all the issues raised by the contest. — *Id.*
5. **ID. — INSANITY — EVIDENCE.** — It being claimed that the will was invalid by reason of the insanity of the testator at the time of its

WILL (Continued).

execution, evidence was admitted as to his sanity at other times during the course of a progressive disease supposed to have affected his mind. *Held*, that the evidence was properly admitted. — *Id.*

6. **ID. — GROUND OF CONTEST NOT INCLUDED IN THE ISSUES.** — Where a question affecting the validity of the will is not included in the issues submitted to the jury, the court may proceed to determine it upon the evidence. — *Id.*

See TRUST, 1.

WITNESS.

1. **HABEAS CORPUS — UNREASONABLE DETENTION.** — A person who has been detained as a witness for ninety days, and after several continuances of the case not satisfactorily accounted for, is entitled to his discharge on habeas corpus. — *Ea parte Dressler*, 257.
2. **FALSE WITNESS MUST BE DISTRUSTED — INSTRUCTIONS.** — Under section 2061, subdivision 3, of the Code of Civil Procedure, a witness false in one part of his testimony, *is to be* distrusted in others, and an instruction to the jury that such a witness *may* be distrusted is error. — *White v. Disher*, 402.
3. **ID. — PRESUMPTION AS TO DISTRUST — FUNCTION OF JURY.** — The distrust which is cast upon a witness wilfully false in a material part of his testimony is a presumption of law for the court, with which the jury have nothing to do, except to receive and act upon it. It is a rebuttable presumption, however, and may be overcome by facts and circumstances of which they are the sole judges. — *Id.*

See CRIMINAL LAW, 21; EVIDENCE; INSTRUCTIONS, 6.

